

JUDGES OF THE HIGH COURT.

CHIEF JUSTICE.

THE HON'BLE SIR JOHN EDGE, *Kt.*

PUISNE JUDGES.

„ G. E. KNOX.

„ H. F. BLAIR.

„ P. C. BANERJI.

„ W. R. BURKITT.

„ R. S. AIKMAN ... (*Offg.*)

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PRIVY COUNCIL.

DEO KUAR (PLAINTIFF) v. MAN KUAR (DEFENDANT).

[On appeal from the High Court at Allahabad.]

P. C.
1894,
June 15th
and 19th,
July 14th.

Voluntary transfer alleged to have been made by a Hindu widow—Burden of proving her knowledge of her rights—Construction of the Pensions Act (Act No. XXIII of 1881), sections 3 and 4—Certificate to precede suit for malikana payable by Government.

WHERE a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee.

The plaintiff, widow of the only son who survived his father, who was the owner of village lands and other property, had become on her husband's death without issue entitled, as his widow, to the estate which he had inherited. But she obtained possession of only half of it. The other half was in the recorded possession, when this suit was brought, of the widow of her late husband's younger brother, who died in his father's lifetime.

The case which the latter widow, as defendant, now sought to make, was that she had become entitled to a share in the estate as the result of a series of transactions, by way of family arrangement, in which the two widows, and their mother-in-law, widow of the deceased father, had taken part. These included a reference to arbitration, a release, and dakhil kharij in settlement records. *Held*, that the plaintiff must succeed, in the absence of proof, of which the burden was on the defendant, that the plaintiff, when ceding half of the estate to which she was entitled, had knowledge of her right, as widow, to the whole, and had freely made what in effect was a gift.

A village, part of the estate, had been made over to the Government by the parties, who in consideration received a malikana in perpetuity, or, in other words, a grant of a portion of the revenue in lieu of their proprietary right. *Held*, that the

Present: LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COCHRAN.

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right to the malikana was on the construction of sections 3 and 4 of the Pension Act, XXIII of 1871, in the absence of a certificate obtained under that Act, excluded from judicial cognizance in this suit. *Vasudev Salashiv Modak v. The Collector of Ratnagiri* (1), and *Maharawal Mohan Singji Jeysingji v. The Government of Bombay* (2), referred to and approved.

APPEAL from a decree (25th June 1889) of the High Court, reversing a decree (29th March 1888) of the Subordinate Judge of Banda.

The plaintiff-appellant and the defendant-respondent were the widows of two Hindu brothers, under the Mitakshara. The father of the brothers, Pransukh Ram, a Gujrati Bania, originally of the Baroda State, came thence to Banda in the North-Western Provinces, where he lived till his death in February 1868. His son, Ganga Ram, the younger of the brothers and husband of the present defendant, died in 1863, before his father. The elder brother, Uttam Ram, the husband of the plaintiff, survived his father, and having inherited his shares in zamindari villages in the Banda and Hamirpur districts, land in the town of Banda, and other family property, the subject of the present claim, died on the 30th October 1875.

The principal question raised on this appeal was whether the plaintiff, upon whom the inheritance had devolved, had entered, with knowledge of her rights, into a series of transactions after her husband's death, ceding to the defendant as a free gift possession of a moiety of the estate to which she herself had become exclusively entitled during her life. These transactions began when, after the death of Uttam Ram, his mother Jarao applied on the 20th December 1875, to have her, Jarao's, name entered as that of the malguzar of mauza Jeorahi, pargana Banda, in substitution for the name of her deceased son in the settlement record. Her name was so recorded; and also the malguzari of other villages, belonging to the estate, was entered in her name, as well as in that of the plaintiff; and of some villages all the three widows obtained dakhil kharij in their names. The facts relating to the assent of the

(1) L. R., 4 I. A. 119; I. L. R., 2
Bom., 89.

(2) L. R.; 8 I. A. 77; I. L. R., 5 Bom.,
408.

plaintiff to the first of these entries in the settlement record, when she was in Baroda, where she remained till 1877, as well as all the matters material to this suit, are stated in their Lordships' judgment.

In June 1876 the defendant left Baroda for Bānda, and the plaintiff followed her in 1877. They lived with Jarao in Bānda till the death of the latter on the 30th November 1877. Before she died, two persons gave what purported to be an award between the three widows, dated 9th October 1877. They apportioned one village of the family estate to Jarao for life, dividing the rest of the property in Bānda and Hamírpur between the two other widows in equal shares. There was evidence that a partition among the widows made of family property at Barnagar in Baroda in 1878, was followed by the execution of farkhattis, or releases, supporting the above division.

Mauza Pachanahi, one of the villages as to which a joint possession by the widows was recorded, was shared by them with one Durga Prasad, who held half of it. By an agreement of the 10th September 1880, this village was made over to the Government on their making a malikana allowance to the former owners of Rs. 2,000 a year. Of this Durga Prasad sold his half share to the widows; and the malikana was included in the present suit. The principal charges in the plaint (19th April 1886), which claimed possession and mesne profits, valuing the claim at Rs. 2,17,985, were that the entries in the record, whereby it had been the object of Jarao and Man Kuar to exclude the plaintiff from her right, had been effected during her absence and without her knowledge. Until Sambat 1940, corresponding to 1884, she had known nothing of the matter.

The defendant by her written statement asserted that by the custom prevailing in Gujrat, the birthplace of both parties, she was entitled as a gotraja sapinda to a share in the family property, though her husband had died in his father's lifetime; and she asserted that Uttam Ram's name had been recorded as that of the owner in possession of the whole zamíndári, not by right of exclusive inheritance, but because he was head of the family and held the

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property in that character. On his death a dispute had arisen between the parties and Jarao Bai as to partition of the estate, and the widows had agreed to refer the question of their rights to arbitration. The arbitrators had on the 9th October 1877 made a just award declaring the defendant entitled to a half share. Even if the defendant's title was defective, according to Hindu law, the award was conclusive and binding on all parties. The suit for malikana was not cognizable under the provisions of Act XXIII of 1871.

The issues raised questions as to the alleged custom, as to there having been an award, and as to its effect, if duly made, as to the partition alleged, and the release; and as to the application of Act No. XXIII of 1871 to the malikana allowance.

The Subordinate Judge, Pandit Ratan Lal, found no proof of the alleged custom. Whatever right the defendant might have could only be derived from the plaintiff, or from the award having made it over to her. On this point he found that the entries in the settlement record did not, in all cases, correspond with the assent alleged to have been given, nor yet with the division of the estate recommended in the so-called award. The latter was inoperative, as the submission of the parties had not been proved, they having, also, been absent, and the whole proceeding having been dictated by Jarao. When documents had been executed by parda women, proof had always been required that they had knowledge of the character and effect of the transaction; that they had some disinterested advice in the matter; and that they put their hands to the document or authorized its execution, understanding what they were about.

This proof being absent, the plaintiff was entitled to decree, but the malikana allowance could not be decreed, as it fell within the meaning of section 3 of Act No. XXIII of 1871, the Pensions Act, and no certificate had been obtained.

On appeal, the High Court (SIR J. EDGE, C. J., and BRODHURST, J.) reversed this judgment, and dismissed the suit.

Their view of the case rendered it unnecessary to consider the alleged custom. They decided in favor of the defendant as to the

fact that the plaintiff had ceded to her the half share, finding on the evidence that the defendant had obtained from the plaintiff, who well knew her own rights and who had the protection of her uncle Jia Ram, since deceased, when she was at Banda in 1877, the property of which the defendant had been in possession for nine years before this suit was brought. They were satisfied that the plaintiff, far from having made out a case of fraud or concealment, was acquainted from the first with what was being done, and that the arrangement was one that was carried out as an award made in accordance with the wishes of the three widows as to the settlement of their claims upon the estate. They observed that there was nothing to prevent the plaintiff from giving evidence to show the fact that she was in 1877, and down to 1882, in ignorance of her legal rights, or of what was being done. She was not strictly parda-nashin; she was not called either to show ignorance of law, if it could assist her, or ignorance of fact, if any existed. Nor was she called to show that she was ignorant of the acts of her own mukhtar, of the suit of 1878, which terminated in a decree against her and the present defendant. In conclusion, they were satisfied that the plaintiff was an assenting party to the arrangement which finally resulted in the mutation of names and in the defendant's obtaining the property claimed.

On this appeal Mr. J. H. A. Branson and Mr. W. A. Raikes, for the appellant, argued that the judgment of the High Court was erroneous. The *prima facie* case which the plaintiff had brought forward had been sufficient to throw the burden of proof on to the defence to establish that a clear assent from her, with knowledge on her part of her rights, had been given to transactions dividing among three persons the estate to which she was exclusively entitled. Arrangements were said to have apportioned it to her brother-in-law's widow and to her mother-in-law. But no proof, and hardly any attempt at evidence, was on the record to show that what had been nothing less than a free gift had been made by the plaintiff with knowledge of her rights.

An alienation purporting to have been made by a Hindu widow, not shown to have had independent advice, made for no consider-

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ation, and without an equivalent, could not be supported; and here, in addition, there was a complete absence of evidence as to her having had any knowledge of her rights, or of the extent to which she was giving them away. The so-called award could not support the gift. It was not an award at all, having been drawn up at the mere dictation of Jarao Bai; and even if properly made, upon submission proved, which it had not been, that award had never been acted upon. The entries in the settlement record did not correspond with it. Not one of the successive steps towards the alleged family settlement had been adequate, nor were they sufficient to support the defendant's case when taken altogether. The claim for malikana had been included.

Mr. J. D. Mayne and Mr. G. E. A. Ross, for the respondent, argued that the judgment of the High Court was right. It had been alleged on the plaintiff's original case that she had been absent, and unaware when matters had transpired to which she in fact assented. But now that all the evidence that could have been adduced was before the court, the question, on whom fell the burden of proof was of less importance than the consideration whether the evidence, taken as a whole, did not establish that she was aware of her rights when she gave her assent. This issue, though lately developed, was readily accepted by the defence, which now insisted that the plaintiff was not in ignorance of her rights when she gave her assent to the entries in the settlement record, and to other steps in the transactions which had amounted to a family arrangement between the three widows. This widow had on the evidence a fair working knowledge of her rights, and how she was dealing with them. That was the strength of the case for the defence coupled with the reasonable and just character of the result, to which actual assent had been given. It was argued that the evidence, as a whole, showed that the plaintiff, with full knowledge of her rights, intended to cede to the defendant her right of management and possession over the villages now sued for. There had been no attempt to diminish or affect the rights of any reversioner after Uttam's widow; and she had been shown to have

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been willing and competent to make a gift, whereby the widow of her brother-in-law, in pursuance of a family arrangement, would have possession for her life of a moiety of the former widow's estate.

Mr. J. H. A. Branson, in reply, maintained the want of proved knowledge on the plaintiff's part, citing *Ashgar Ali v. Delroos Banoo Begum* (1).

Afterwards, on the 14th of July, their Lordships' judgment was delivered by Lord Hobhouse.

This is a family dispute. The defendant, who is the present respondent, has been placed in possession of half the family property, and the plaintiff, who is appellant and who is in possession of the other half, claims the whole. The family whose property is in question were Gujrati Baniyas, who some time back migrated from Baroda to Banda, but retained some property in Baroda, and had relatives there. They were a joint Hindu family subject to the law of the Mitakshara. In the year 1868 Pransukh Ram, the then head of the family, died at Banda. He left surviving him his widow Jarao Bai, and one son Uttam Ram, and two daughters. He had another son Ganga Ram, who predeceased him, leaving no issue. Uttam Ram, who took the whole inheritance, died on the 30th October 1875, leaving no male issue. The plaintiff is his widow. The defendant is the widow of Ganga Ram.

There is now no question but that on Uttam Ram's death the whole inheritance devolved on the plaintiff. She then thought she was pregnant and might have a son, but those hopes were delusive. In this suit it has been contended that the defendant was entitled to share in the inheritance on the ground of some local or caste custom applying to the family; but it has been found that there is no such custom, and there is no evidence that the plaintiff's right to inherit was ever seriously brought into question prior to this suit.

The plaintiff's claim is denied, and the defendant's title is rested on the ground that by a long series of transactions which

(1) I. L. R., 3 Cal., 324.

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will be passed in review, the plaintiff transferred to the defendant a moiety of the plaintiff's property. The Subordinate Judge held that there was no such transfer and gave the plaintiff a decree. The High Court thought differently and dismissed the suit. From that decree the plaintiff now appeals.

The first transaction is an application by Jarao, the widow of Pransukh and the mother of Uttam, made on the 20th December 1875, to have her name substituted for that of her son in the settlement records. The evidence of proceedings on this application is contained in the recitals to an order dated the 25th November 1876, relating to the lambardárship of one of Uttam's mauzas.

It appears that the plaintiff was then in the family house at Barnagar in Baroda, and that the presiding Settlement Officer communicated with her through the British Agent at Baroda. On the 12th June 1876, the Settlement Officer received a letter from the Agent as follows :—

"I send herewith the original deposition, in Gujrati, of Musammât Diwali Bai, widow of Uttam Ram, with an English translation thereof. She has given her consent to the entry of the name of the mother of Uttam Ram in the settlement papers in place of her deceased son, on the following conditions :—' I am with child, in the first place. In the event of a son being born his name shall be entered as the heir to the estate of Uttam Ram ; secondly, if a son be not born, my name shall be entered after the death of the mother of Uttam Ram. ' "

Upon that he delivered the following opinion :—

"As Diwali Bai, the widow of Uttam Ram, deceased, does not relinquish her right it appears necessary that the names of both the Musammats, with a detail of their shares, be entered, but by way of precaution it may be ascertained from the Collector if there is any harm, in his opinion, in entering the names of both the Musammats. It is clearly to be stated that the whole management will rest with the mother of Uttam Ram. By the time the papers are prepared it will have been ascertained whether Musammât Diwali Bai has given birth to a son."

On the 20th June 1876, the Collector sent an answer of a very extraordinary character. He said that in his opinion there was no harm in entering the names of Jarao and also that of the defendant. Why the Collector took upon himself to introduce, quite gratuitously it seems, the name of the defendant, is nowhere

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explained. It appears to have been the beginning of a series of errors.

The Settlement Officer indeed acted correctly, for on the 4th July he directed that the office should make an entry of names according to the order of the 12th June. But the case was transferred to the Settlement Court of Banda, when the following proceeding took place, apparently on the 12th August:—

“Musammat Jarao Bai, the mother of Seth Uttam Ram, deceased, presented a petition to the Settlement Officer for the entry of her name alone in place of Seth Uttam Ram. The order passed thereon was that there were three heirs to this estate, viz., (1) Musammat Jarao Bai, the widow of Pransukh Ram, deceased; (2) Diwali Bai, the widow of Uttam Ram, deceased; and Musammat Banke Bai, widow of Ranga Ram, deceased; and that therefore it was expedient to enter the names of all the three with this condition, that the management of the whole estate should be entrusted to Musammat Jarao Bai for her life, and that when a new khewat would be prepared the names should be entered according to this order in equal shares.”

In this way it seems that the Revenue Court, misled by the Collector's letter, gave the defendant a position to which she had no right, which was not conceded to her by the plaintiff, and was not demanded either by herself or by Jarao on her behalf.

The order of the 25th November 1876, in the preamble of which the above stated proceedings, and some subsequent proceedings in September and November, are narrated, was made for the purpose of settling a dispute in the mauza of Jeorahi. The question was whether one Bhura, a shareholder, or the heirs of Uttam should be entered as lambardar. The Settlement Deputy Collector decided in favour of the heirs; in entering the heirs he followed the error of the order of August. In his judgment he states that the heirs are the three widows, and in his order he directs that their names should be entered in equal shares with the following conditions:—

“That the whole management of the estate will be entrusted to Musammat Jarao Bai during her lifetime, and that in the event of a son being born to Musammat Diwali Bai, who was with child at the time of the death of Seth Uttam Ram, the name of the son would be entered as successor to Seth Uttam Ram, deceased, in respect of the property.”

It is not clear upon the record in how many of Uttam Ram's mauzas, 26 in all, the above procedure was followed when the

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names were changed. It would seem that in some the name of Jarao alone was entered; in some, the plaint says three, the names of Jarao and the plaintiff; and in some, as in Jeorahi, the three names. That inquiry is not now of importance. The point is that the true heir, the plaintiff, was not in any case entered in lieu of Uttam. There is nothing to show that she knew her rights or received any independent advice. But even if she did know what she was doing when she made her deposition in May 1876, the orders of August and November 1876 were wholly at variance with her intentions as expressed in that deposition, and with the directions of the Settlement Officer made upon it on the 12th June and the 4th July. It is in the opinion of their Lordships beyond doubt that at this time the plaintiff might have maintained a suit for the correction of the records by the insertion of her own name as sole heir.

The next stage in the transactions took place during the year 1877, and is quite as extraordinary as the first stage. It terminated in a document dated the 9th October 1877, purporting to be an award of arbitration by Seth Kishan Chand and Lachhman Shankar Bhat; but the circumstances which led up to this award are left in deep obscurity. The arbitrators recite that the three widows have appointed them "for the settlement of their respective contentions in respect of the right of ownership" over Uttam's property. But they do not settle any such contention, nor do they intimate what contentions there were. They recite thus:—

"Musammatt Jarao Bai was asked by us in what manner she wished the partition to be made; to which she replied that she wished mahal Pransukh Ram, situated in manza Chhanon, pargana Sihonda, to be given to her for her maintenance, and that as regards the remaining zamindari villages and property and chattels held in common, she wished that they should be divided in two equal shares, and one-half given to each of her two daughters-in-law, and that this course would be agreeable to her."

And then they go on to express Jarao's wishes in the form of an award; directing as to most of the mauzas that they shall be held by the two younger widows in equal moieties, and as to some giving them to one or to the other in entirety, but so as to give about the same value to each.

•The agreement to refer has not been proved. A copy was tendered but rejected by both Courts. Both the arbitrators have given evidence in the suit, apparently with great candour. Neither of them mentions what the point of dispute was. According to both the award originated with Jarao. Neither of them had any communication with the two younger widows about the award, either before it or after. Kishun Chand says, "As to the arbitration I had asked Jarao Bai what was the award to be"; and then he did as she bid him. Lachmi Shankar says, "We, the arbitrators, did not make the award according to our own judgment. We made the award as asked by Jarao Bai." It is obvious that such a proceeding is not an award at all, but is entirely devoid of legal effect, as it was treated by the Subordinate Judge. The right which the plaintiff had to sue for her inheritance prior to the award remained to her undiminished by the award.

It is not indeed contended by the defendant's counsel that the award by itself can have any legal effect. Nor do their Lordships understand that the learned Judges of the High Court so treated it, though they lay a good deal of stress upon it. They hold that there was "family arrangement in settlement of the contentions between the ladies," and that this arrangement was "carried out in the way of an award in accordance with the wishes of the three ladies as to the settlement of their respective claims to the estate." That seems quite a legitimate use to make of the award, if only the evidence supports it.

But first, their Lordships cannot find what contentions or claims there were to be settled. They pressed the defendant's counsel on this point, and he could not point out any indication of any such contention or claim except the general statement in the award itself. What the evidence shows is that there was personal friction between the two younger widows, which they palliated by setting up separate domestic arrangements, but which the division of Uttam's property had no tendency to allay. They were not less likely, perhaps more likely, to fall out in taking accounts of the shares due to each, than in settling the maintenance to which the

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defendant was entitled. And secondly, there is no evidence to connect the award with the wishes of the three ladies. It embodied the wishes of Jarao. But we know nothing of the plaintiff's wishes except by her deposition of May 1876, and that gives no countenance to the award.

In opening the defendant's case Mr. Mayne frankly admitted that there was no award in any legal sense, and that he could not find any consideration passing from the defendant to the plaintiff so as to support his client's case on the ground of contract. But he contended that the whole series of transactions between Uttam's death and the institution of this suit, of which the award is an important item, supports the conclusion that for some motive or other the plaintiff deliberately intended that her sister-in-law should have an equal share in the property. And he subjected the whole evidence to a very careful examination to prove that point. That in effect puts the defendant's case on the footing of a free gift by the plaintiff, and Mr. Mayne accepted that issue. This is not the issue raised by the pleadings, nor the issue presented to the Subordinate Judge; but as it may have been in the mind of the High Court their Lordships have considered this view of the evidence. In order to succeed upon it the defendant must show that the plaintiff, knowing her rights and knowing that she was making a free gift to her sister-in-law, did so make it.

Their Lordships have already shown that prior to the award the evidence is not favorable but adverse to the theory of such a gift. The award itself adds to the adverse evidence; for if the plaintiff wished to make a gift, why should Jarao set up the fictitious machinery of an arbitration? If their Lordships are to find evidence for a gift they must find it in circumstances subsequent to the award. And that brings us to the third stage of the history.

On the 13th November 1877, Jarao died. During her life no mutation of names was made in pursuance of the award; but that period was so short that no importance can be attached to the omission. On the 25th November the karinda of Jarao applied to the Settlement Court stating that she was the zamindar of mauza

Malathu, one of Uttam's mauzas, and that the plaintiff and defendant were the heirs; and he asked that their names should be entered in lieu of hers as mortgagees of a large number of parcels. That mutation was ordered accordingly; "by right of inheritance" as the order expresses it. On the 7th December 1877 one Khan Muhammad, calling himself karinda and mukhtar of the two widows, applied for mutation of names in Semaria, another of Uttam's mauzas. He puts into their mouths the statement that Jarao was proprietor and owner of the entire 16 annas, and that her daughters-in-law are her heirs. Similar applications were made in other mauzas by other karindas. So far as they are given in the record they are to the same effect as the two just stated. The result of the evidence is that the names of the plaintiff and defendant came to be entered jointly in respect of the properties now sued for within a few months of Jarao's death, on the statement that she was the owner and that they were her heirs.

Pausing again, we may ask how the mutations of names in 1878 support the theory of a gift by the plaintiff, or if it is preferred so to put it, of the existence of wishes on the part of the three widows which the award correctly expressed. The answer is, that the mutations are not in accordance with the award, and instead of supporting it throw discredit on it.

Take for instance mauza Baragaon, which is one of those now held in moieties, and is put in suit accordingly, but the award gives it to the plaintiff in entirety. So mauza Keri was awarded to the defendant in entirety, but is held in moieties. There is at least one other mauza in the same position, probably more, but it is not easy to trace the whole list.

Independently of those variations, not material as regards value, but material as showing that it was not the award which the agents of the parties took for their guide, the whole claim for the mutations of 1878 was founded on statements which differ as widely from the award as they do from the truth. The statement that Jarao was owner and proprietor contradicts everything that preceded it. By the plaintiff's consent in 1876 Jarao was let in to be joint owner

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and manager ; possibly for such an interest as would be ascribed to the widow of Pransukh if he had died without male issue. By the award she took no interest in any part of the property except in one mauza for life. Lachmi Shankar is quite right in saying, "The arbitration award was not acted upon. Mutation of names was not made according to it.....the names of Man Kuar and Deo Kuar were entered in respect of equal shares by right of inheritance. The names were entered by right of inheritance from Jarao Bai."

Now those who allege that a gift is to be inferred from a series of transactions should be able to show a reasonable amount of consistency in the transactions on which they rely. We have seen that the mutations of 1876 were contrary to the plaintiff's wishes expressed in her deposition, of that year, and that the award was equally contrary to the deposition and to the mutations of 1876. Now it appears that the mutations of 1878 were just as contrary to the deposition and to the former mutations and to the award. So far the evidence appears to their Lordships to be destructive of the theory now put forward on behalf of the defendant.

An attempt is made to support the award or the arrangement expressed in it by showing that Chunni, a daughter of Jarao, who was awarded an annuity of Rs. 50, sued the plaintiff and defendant for it and got a decree. But supposing those proceedings to be evidence in this suit, the answer is that the suit was undefended and the decree made *ex parte* and there is neither proof nor probability that the plaintiff knew anything about them. Lachmi Shankar, who acted for her, says that he did not tell her about the suit. He adds, "all the suits were brought in consultation with me and Gobind Das. It was a work connected with the shop. There was no occasion to refer to Deo Kuar and Man Kuar." The same kind of observation applies with nearly as much force to the two documents filed in the Tahsildar's Court in 1880. One is said to bear the plaintiff's mark, the other her full signature. But no proof is offered that any explanation of the documents was given

to her, or that she gave any intelligent assent to them. The Subordinate Judge observes of all this class of evidence that the whole affair is the work of agents and mukhtárs, and that no care appears to have been taken such as the law requires in the case of parda nashin ladies. Their Lordships think that those remarks are justified by the evidence.

Great reliance has been placed upon the fact that in the year 1878 a partition was effected, through a panchayat acting on behalf of the two younger widows, of a family house and some chattels in Barnagar. This operation, it is argued, is exactly in accord with the doings in Bánda,—and not only so, but by the farkhati, or deed of release made between the parties, the partition in Bánda is expressly affirmed. Certainly if all this was brought home to the plaintiff, and it were shown that with full information and intelligence she authorized such a partition and signed such a deed, it would tell for the defendant. But there is no evidence to that effect. The plaintiff's name was signed by one of her uncles; and the deed of release sets out with a serious mis-statement. The property is represented as that of Pransukh, who stood in an equal relation to his two daughters-in-law. But it was in fact the property of Uttam, the plaintiff's husband. Whatever may be the local customs of Baroda (and none are proved) it is impossible to suppose that the descent from Pransukh to Uttam ought to be passed over in silence, or that the plaintiff understood her true position. Indeed, it is a most remarkable phenomenon in this case, that wherever we come across statements or entries referring to title they are based on error. Their Lordships are of opinion that the Barnagar transactions are of very little, if any, help to the defendant's case.

The real strength of her case is her possession, which appears to have continued for about eight years before suit. It is not long enough to afford a defence by mere lapse of time. It is one of the circumstances to be taken into consideration in estimating the theory of the plaintiff's wish to make a gift to her sister-in-law; a very important one doubtless, and such as might reasonably incline a

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court of justice in the defendant's favour if the prior history of the case was in her favour. But their Lordships have shown reasons for concluding that the prior transactions are not only not favorable, but are decidedly adverse, to the defendant. In their judgment the evidence shows that, either from the influence of Jarao, or from carelessness or mistakes on the part of officials and of family agents, a number of unwarrantable liberties were taken with the plaintiff's name and interest; and that the defendant thereby gained a position to which she was not entitled. It is clear to them that, at least as recently as the mutations of 1878, the plaintiff might have sued to have her property restored to her, and that to such a suit there could have been no substantial defence. Her inaction is not explained except by her statement in the plaint that she had only then discovered what had been done. Very likely that is an exaggerated statement of her ignorance. But even supposing that she learned the defendant's position in the course of 1878, and that she was supine for eight years, that is no sufficient reason for imputing to her wishes and intentions which all the other circumstances of the case contradict.

There is a minor point respecting the malikana of mauza Pachanahi, which amounts to Rs. 1,500 per annum. As between the plaintiff and defendant, it stands in exactly the same position as the other property, but the Subordinate Judge considered that the jurisdiction of the Civil Court is taken away by the Pensions Act, 1871. The plaintiff made it the subject of appeal to the High Court, but of course it was there merged in the larger issue decided adversely to her. She has raised the question again on this appeal. Mr. *Mayne* declined to argue it on the defendant's behalf. Mr. *Branson* submitted rather than argued it on behalf of the plaintiff; but he cited no authority, and their Lordships have not been able to find any bearing directly upon the subject.

The Pensions Act, 1871, enacts that:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been

the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted." The expression "grant of money or land revenue" is interpreted to include anything payable on the part of Government in respect of any right, privilege, perquisite or office.

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Mauza Pachanahi was taken into the hands of the Government and held khas in or before the year 1880, and by a deed dated in September of that year the plaintiff and defendant formally made over to Government their proprietary rights on consideration of receiving Rs. 2,000 per annum as malikana in perpetuity. Malikana is the allowance made to proprietors so dispossessed. By Regulation VII of 1822 it might vary from 5 to 10 per cent. of the income realized. That Regulation was repealed as regards the North-Western Provinces by Act XIX of 1873, and fresh provisions for allowances to dispossessed proprietors were substituted. It does not appear under what circumstances the mauza was taken into khas management, but it cannot be doubted that the allowance stipulated for and granted was of the nature indicated by the term malikana, i.e., a grant of a portion of the revenue in lieu of pre-existing proprietary rights.

It is at first somewhat surprising that a property which has been the subject of bargain and of formal grant should be excluded from the cognizance of Civil Courts. But it cannot be denied that it falls within the literal construction of the words of the Pensions Act, i.e., it is something payable on the part of Government in respect of a right. And the decision of this Committee in *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1) and again in *Maharawal Mohansingji Jeyasingji v. The Government of Bombay* (2) shows that the language of the Act applies to cases in which the grant has been made in consideration of prior rights vested in the grantee. In the former case the subject of the suit was a grant made by the Peishwa to an hereditary deshmukh authorizing him to levy dues from the ryots, which dues were subsequently collected

(1) L. R., 4 I. A., 119.

(2) L. R., 8 I. A., 77.

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by the British Government and paid over to the deshmukh. In the latter case the subject was a *to da g-ras hukh*, which, though originating in blackmail, had long been recognised as property capable of alienation and of seizure and sale in execution; and the liability for which had been assumed by the British Government. In both cases it was held both by the Courts below and by this Committee that the Civil Courts were incapacitated by the Pensions Act from entertaining suits. It is not for their Lordships to examine into the relations between the Government, the farmers, the ryots and the grantees of malikana, or the previous state of the law, or the other considerations which may have dictated the policy of the Pensions Act. It is enough if its effect is expressed in clear terms. The plaintiff might have applied for a certificate which would have enabled the Court to make some declaration of right as between her and the defendant, but she did not do so, and must submit to the disability which the Act imposes upon the Court.

The plaintiff fails to get the decree of the Subordinate Judge altered in her favour in this respect, but it does not appear that her claim to do so has had any effect on the costs of this appeal. Their Lordships will humbly advise Her Majesty to discharge the decree of the High Court, except in so far as it disallows with costs the objections of the plaintiff to the decree of the Subordinate Judge; to dismiss the defendant's appeal to the High Court with costs; and to restore the decree of the Subordinate Judge. The defendant must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant:—Mr. T. C. Summerhays.

Solicitors for the respondent:—Messrs. Barrow and Rogers.

APPELLATE CIVIL.

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July 20.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*CHUHI BIBI (PLAINTIFF) v. SHAMS-UN-NISSA BIBI AND OTHERS
(DEFENDANTS).**Muhammadan Law—Dower—Mortgage by widow in possession in lieu of dower.*

A Muhammadan widow in possession of immovable property of her late husband in lieu of her dower has no power to mortgage such property.

THIS was a suit for the recovery of possession of certain immovable property and for cancellation of a mortgage deed, executed by the first defendant (a Muhammadan widow in possession in lieu of her dower debt) in favor of the second and third defendants.

The plaintiff alleged that one Shaikh Sajjad Husain, own brother of the plaintiff, was the proprietor of certain immovable property; that Sajjad Husain died in 1885, leaving a childless widow, Musamat Shams-un-nissa Bibi, defendant No. 1; that defendant No. 1 in lieu of an alleged dower debt of Rs. 1,000 took possession of the immovable property of her late husband, and subsequently sold part of it for Rs. 1,500, the whole of which she retained, and again mortgaged another portion to defendants Nos. 2 and 3 for Rs. 400, in spite of the plaintiff having informed the said mortgagees of her claim against the property. The plaintiff claimed as above cancellation of this mortgage and possession of the mortgaged property.

The first defendant pleaded that the dower debt was Rs. 51,000 and not Rs. 1,000 as stated in the plaint; that the plaintiff was therefore not entitled to sue upon satisfaction only of Rs. 1,500 out of the above amount; and that the plaintiff had in fact acquiesced in her possession and allowed her name to be entered in the Government papers as proprietor.

The second and third defendants set up their title as mortgagees in good faith from the defendant No. 1, and pleaded that

* Second Appeal No. 539 of 1893, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 29th of March 1893, reversing a decree of Babu Pramatha Nath Banerji, Munsif of Jaunpur, dated the 9th of March 1892.

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they could not be ejected without payment to them by the plaintiff of the mortgage money advanced by them to defendant No. 1.

The Court of first instance (Munsif of Jaunpur) found that the dower debt was Rs. 1,000 and not Rs. 51,000, as alleged by defendant No. 1; and that it had been more than satisfied by the sale by the said defendant of a portion of the property for Rs. 1,500. It also found that the defendants-mortgagees might and should have been aware of the nature of the title of their mortgagor, and it decreed the plaintiff's claim in full.

The defendants appealed. The lower appellate Court (Subordinate Judge of Jaunpur) found that the dower debt was in fact Rs. 51,000, and as a consequence of this finding decided that the defendant No. 1 was entitled to retain possession, and that the plaintiff's suit was premature. It accordingly decreed the appeal and dismissed the plaintiff's suit without deciding any of the other issues.

The plaintiff appealed to the High Court.

Mr. *T. Conlan* and Babu *Becha Ram Bhattacharji*, for the appellant.

Maulvi *Ghulam Mujtaba* and Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and BANERJI, J.—This was a suit for possession of immovable property and for the cancellation of a mortgage. The suit was brought against a Muhammadan widow and two men who held as mortgagees under her. She was in possession of the property in lieu of her Muhammadan dower, and had no other title to it. She, however, granted a mortgage to the other two defendants. The plaintiff would be the person entitled to possession of the property, if the widow had no right to possession in lieu of her dower.

The Privy Council have held that where a Muhammadan widow is lawfully in possession in lieu of her dower, her possession cannot be disturbed except on payment of the dower debt; consequently

this suit, so far as it claims possession, must fail, the dower debt being still due.

It has been held on several occasions in this Court that a Muhammadan widow in possession in lieu of her dower cannot sell any portion of the property. She cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower. It has never been held, so far as we are aware, that a Muhammadan widow, under such circumstances, can grant a valid mortgage of any portion of the property in her possession in lieu of dower, and the principle of the decisions in which it has been held that she may not sell, appears to us to apply equally to the case of her attempting to mortgage.

We allow this appeal to the extent of giving the plaintiff a decree declaring that the mortgage is inoperative and passes no title to the male defendants.

In other respects we dismiss the appeal. Each party will bear its own costs.

Decree modified.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji and Mr. Justice Burkitt*

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July 27.

AMRIT RAM AND ANOTHER (DEFENDANTS) v. DASRAT RAM AND OTHERS
(PLAINTIFFS).*

Civil Procedure Code, ss. 525, 526—Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.

AN objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa* (1); *Samal Nathu v. Jaishankar Dalsukram* (2); *Venkatesh Khando v. Chanapavda* (3);

* Reference to the Full Bench in First Appeal No. 244 of 1892, decided on the 7th November 1894.

(1) L. R., 3 I. A. 209. (2) I. L. R., 9 Bom., 254.

(3) I. L. R., 17 Bom., 674.

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Lalla Isharee Parshad v. Harbajan Tewariee (1); *Hussaini Bibi v. Mohsin Khan* (2); *Surjan Raot v. Bhikari Raot* (3); and *Muhammed Nawaz Khan v. Alam Khan* (4); referred to.

THE facts of this case are as follows :—

One Salig Ram applied under s. 525 of the Code of Civil Procedure to the Court of the Additional Subordinate Judge of Ghazipur praying that an award, which he alleged had been made on the 9th of September 1888, between himself and the opposite parties, his father and two brothers, might be filed in Court.

The opposite parties, Amrit Ram the father and Raja Ram the brother of the applicant, both filed written statements, in which they severally denied that any arbitration had taken place to their knowledge, and asserted that the whole property, the subject of the arbitration set up by the applicant, belonged solely to Amrit Ram. Amrit Ram also pleaded that if there had been a reference to arbitration the reference was invalid as not being in writing and registered.

The Additional Subordinate Judge held that it was not necessary that the reference to arbitration should have been registered, and that there had in fact been a reference to arbitration as alleged by the applicant and a valid award made thereon. He also held that no ground such as is mentioned in s. 520 or s. 521 of the Code of Civil Procedure had been shown against the award, and accordingly ordered that the award should be filed in Court.

No judgment, however, was passed and no decree was drawn up by the Court in accordance with this last mentioned order; and subsequently the sons of Salig Ram, who had meanwhile died, applied to the Court that a decree might be drawn up in accordance with the award and in pursuance of the Court's order.

Amrit Ram and Raja Ram resisted this application on various technical grounds, but the Court overruled their objections and passed judgment in the terms of the award, likewise ordering a decree to be prepared in accordance with those terms.

(1) 15 W. R., (F. B.) 9.

(2) I. L. R., 1 All., 156.

(3) I. L. R., 21 Calc., 213.

(4) L. R., 18 I. A., 73.

Amrit Ram and Rája Ram appealed to the High Court urging the following pleas :—

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“(1) Because there was no reference and consequently no valid award to form the basis of a decree; (2) because the evidence shows that there was no reference whatsoever; it was also bad for not being in writing and registered; and (3) because the award is also bad under ss. 520 and 521 of the Code of Civil Procedure.”

On the appeal coming before a Division Bench it was referred to a Full Bench of the whole Court for consideration of the question raised, as stated in the opening words of the judgment of the Full Bench.

Babu *Viddya Charan Singh*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.), was delivered by EDGE, C.J. :—

The question which we have had to consider in this reference to the Full Bench is—when an application is made to a Court under s. 525 of Act No. XIV of 1882, that an award be filed in Court, does an objection by the other party, defendant, that he had not agreed to refer any matter to arbitration oust the jurisdiction of the Court to which the application is made to proceed further in the matter, or has that Court jurisdiction to proceed, and should it proceed to try the issue as to whether the parties had referred to arbitration the matter as to which the award purports to have been made?

In support of the contention that such an objection deprives the Court of jurisdiction, *Bijadhur Bhugut v. Monohur Bhugut* (1), and the judgments of Prinsep, Pigot and Macpherson, JJ., in *Surjan Raot v. Bhikari Raot* (2) were relied upon. In support of a contention raised before us that when such an objection is not obviously frivolous the jurisdiction of the Court to proceed is ousted, *Samal Nathu v. Jaishankar Dalsukram* (3) and *Venkatesh Khando v.*

(1) I. L. R., 10 Cal., 11.

(2) I. L. R., 21 Cal., 213.

(3) I. L. R., 9 Bom., 254.

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The Additional Subordinate Judge held that it was not necessary that the reference to arbitration should have been registered, and that there had in fact been a reference to arbitration as alleged by the applicant and a valid award made thereon. He also held that no ground such as is mentioned in s. 520 or s. 521 of the Code of Civil Procedure had been shown against the award, and accordingly ordered that the award should be filed in Court.

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Amrit Ram and Raja Ram resisted this application on various technical grounds, but the Court overruled their objections and passed judgment in the terms of the award, likewise ordering a decree to be prepared in accordance with those terms.

(1) 15 W. R., (F. B.) 9.

(3) I L. R., 21 Cal., 213.

(2) I. L. R., 1 All., 156.

(4) L. R., 18 I. A. 73.

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“(1) Because there was no reference and consequently no valid award to form the basis of a decree; (2) because the evidence shows that there was no reference whatsoever; it was also bad for not being in writing and registered; and (3) because the award is also bad under ss. 520 and 521 of the Code of Civil Procedure.”

On the appeal coming before a Division Bench it was referred to a Full Bench of the whole Court for consideration of the question raised, as stated in the opening words of the judgment of the Full Bench.

Babu *Viddya Charan Singh*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

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(1) I. L. R., 10 Calc., 11.

(2) I. L. R., 21 Calc., 213.

(3) I. L. R., 9 Bom., 254.

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Channpavda (1) were relied upon. In further support of those contentions it was argued that we ought to conclude that the Legislature, in order to give effect to the views expressed in the judgment of Lock, Kemp, and Paul, JJ., in *Lalla Ishri Parshad v. Har Bhanjan Tewaree* (2) and in the judgment of Spankie, J., in *Hussaini Bibi v. Mohsin Khun* (3), which were that a Court had no jurisdiction under section 327 of Act No. VIII of 1859 to file an award where one of the parties denied or did not admit that he had referred any dispute to arbitration or that an award had been made, had introduced s. 526 into Act No. X of 1877, and had re-enacted that section in Act No. XIV of 1882. As to the latter contention, it was much more probable that the Legislature in enacting section 526 of Act No. X of 1877 had acted on the suggestion thrown out by their Lordships of the Privy Council in *Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa* (4) at p. 213, and that the intention was to widen the scope of the inquiry upon which a court could enter on an application to file an award when the reference to arbitration had been made without the intervention of a Court of justice. Their Lordships in that case, referring to Act No. VIII of 1859, had said:—"Their Lordships are of opinion that upon the construction of the Act the earlier sections are not incorporated into the s. 327, as they are expressly incorporated into the s. 326, and that the words 'sufficient cause' should be taken to comprehend any substantial objection which appears upon the face of the award or is founded on the misconduct of the arbitrator or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country." It may be noticed that Norman, C. J., and Jackson, J., in *Lalla Isharee Parshad v. Har Bhanjan Tewaree* (2), apparently considered that a Court could, under s. 327 of Act No. VIII of 1859, go into the question and decide, but subject to a right of appeal, that the parties had referred the matter in dispute to arbitration and that an award on such matter had been made. As the decision of their Lordships of the Privy Council in *Chowdhri*

(1) I. L. R., 17 Bom., 674.

(2) 15 W. R. (F. B.) 9.

(3) I. L. R., 1 All., 156.

(4) L. R., 3 I. A. 209.

Murtaza Hossein v. Mussumat Bibi Bechunnissa (1) was reported in the volume of the Law Reports, Indian Appeals, which was published in 1876, and as ss. 525 and 526 of Act No. X of 1877 apparently give substantial, although possibly not full, effect by legislation to the suggestion of their Lordships at page 213 of the Report, it certainly seems probable that ss. 525 and 526 of Act No. X of 1877 were enacted with the intention of giving effect to the suggestion of their Lordships and not with the intention of affirming by legislative enactment the views of Lock, Kemp and Paul, JJ., as to the scope of s. 327 of Act No. VIII of 1859. However that may have been, we must decide the question before us upon the construction of ss. 525 and 526 of Act No. XIV of 1882.

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Before proceeding to consider ss. 525 and 526 of Act No. XIV of 1882 it may be observed that West and Nanabhai Haridas, JJ., in *Samal Nathu v. Jaishankar Dalsukram* (2) and Sir Charles Sargent, C. J., and Candy, J., in *Venkatesh Khanda v. Chanappagarda* (3), apparently considered that an objection to an application under s. 525 to file an award that the parties had not agreed to a reference to arbitration did not oust the jurisdiction of the Court in the matter, if the objection was obviously unfounded, which, as it appears to us, involved the proposition that the Court has jurisdiction to consider to a limited extent the evidence for and against such an objection. Even that limited jurisdiction a Court would not have if the opinions on this subject expressed in the judgment of Prinsep, Pigot and Macpherson, JJ., in *Surjan Rao v. Bhikari Rao* (4) are correct, according to which the denial or non-admission that the parties had agreed to a reference to arbitration deprives a court of jurisdiction to do otherwise than refuse to file the award.

There can be no doubt that s. 525 of Act No. XIV of 1882 applies only when a matter has been referred to arbitration without the intervention of a Court of justice and an award has been made thereon. There must have been a matter referred to arbitration, there must have been an award on the matter referred, and the reference

(1) L. R., 3 I. A. 209.

(2) I. L. R., 9 Bom., 254.

(3) I. L. R., 17 Bom., 674.

(4) I. L. R., 21 Calc., 213.

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must have been made without the intervention of a Court of justice. These facts must exist as the foundation of the jurisdiction of a Court under ss. 525 and 526 to order the award to be filed. In other cases, when a question as to the jurisdiction of a Court arises, the Court has to hear and determine the question of jurisdiction, and for that purpose, when the question of jurisdiction depends on questions of fact upon which the parties are not agreed, the Court has to take and consider evidence. In our opinion when a Court is in certain events given by statute a jurisdiction, and it is not expressly provided that it shall not exercise that jurisdiction except on the mutual admission of the parties or with their consent, the Court, if its jurisdiction is disputed by a party, must ascertain and determine whether the facts do or do not exist upon which the question of its jurisdiction in the particular matter depends. That we consider to be a matter of general principle. Is that general principle curtailed or made inapplicable by anything contained in s. 525 or s. 526 of Act No. XIV of 1882, or is it by either of those sections recognised?

The application under s. 525 is to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the Court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed. It has been held, notwithstanding some decisions to the contrary, in *Dandekar v. Dandekars* (1), *In the matter of the petition of Datto Singh* (2), *Jones v. Ledgard* (3), *Surjun Rao v. Bhikari Rao* (4) and in *Jagan Nath v. Mannu Lal* (5), and in our opinion rightly, that the term "to show cause" does not merely mean to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

By s. 526 it is enacted:—"If no ground such as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the

(1) I. L. R., 6 Bom., 663.

(2) I. L. R., 9 Calc., 575.

(5) I. L. R., 16 All., 231.

(3) I. L. R., 8 All., 340.

(4) I. L. R., 21 Calc., 213.

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Court shall order it to be filed and such award shall then take effect as an award made under the provisions of this chapter." It appears to us that if the Legislature had intended by s. 526 to confine the grounds which might be shown to the filing of the award to the precise grounds mentioned or referred to in s. 520 or s. 521, it would have said so, and not used the words "*such as* is mentioned or referred to." It appears to us from the use of the words "such as" that the Legislature intended that the grounds which might be shown should be those mentioned or referred to, or grounds *ejusdem generis* with those mentioned or "referred to, in s. 520 and in s. 521." One of the grounds mentioned in s. 520 is—"(*a*) when the award has left undetermined any of the matters referred to arbitration, or when it determines any matter not referred to arbitration." S. 525 applies as well to a parole or oral agreement referring matters in dispute to arbitration as to an agreement in writing referring matters in dispute to arbitration. For the purpose of illustrating what in our opinion is the construction and an application of s. 526 we take the case of a person coming into Court with three documents. One of them he alleges to be an agreement in writing made between him, A., and another person, B., by which questions *a*, *b*, and *c*. purport to have been referred to arbitration; another of those documents he alleges to be an award made under that agreement of reference which purports to decide the questions *a*, *b* and *c*; the third document being his application to the Court under s. 525. Notice under s. 525 having been given to B. to show cause why the award shall not be filed, he, B., alleges that he did not agree to refer questions *a*, *b* and *c*, or that he did not agree to refer any question to arbitration. It appears to us that that is the same as if B. had said in other words—"the matters determined by the award were not referred to arbitration," or—"the award determines *a*, *b* and *c*, matters not referred to arbitration." That objection, however it was expressed, would not only be *ejusdem generis* with, but would be one of the precise grounds mentioned and referred to in cl. (*a*) of s. 520, and consequently would be a ground which, if taken, a Court would have to consider and adjudicate upon under s. 526, whether the decision of the Court would depend merely upon the construction of the agree-

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ment, or upon evidence on the one side that the agreement in writing was in fact the agreement of the parties, and upon evidence on the other side that the defendant never had entered into the agreement and that it was a forged document, or that the acceptance of the agreement by the defendant had been obtained by a fraud of the plaintiff which would avoid the agreement. In a similar case defendant might say :—"I agreed to refer questions *a* and *b*, but I never agreed to refer question *c*. The plaintiff, after I executed the agreement of reference, fraudulently inserted in it without my knowledge or consent question *c*, and the award has determined question *c*, which was a matter which was never referred to arbitration, and has left undetermined questions *a* and *b*, which were matters referred to arbitration." Those two grounds of objection would in our opinion clearly be within cl. (a) of s. 520. Assume again that the alleged award determined only one matter. We can see no distinction, except in phraseology, between a defendant saying, in showing cause to the application to file the award,—“the award sought to be filed determines a matter not referred to arbitration,” and his saying; so far as it was pertinent to the issue,—“I never agreed to refer any matter to arbitration.” The issue would be the same, namely, “did the parties agree to refer to arbitration the matter determined by this award,” and, unless the objection depended solely upon the construction of an admitted agreement of reference in writing, the Court would, under cl. (a) of s. 520 as applied by s. 526, have to determine whether any and what agreement of reference was made orally or in writing as the case might be between the parties.

An appeal would lie from the decree which followed the judgment given on the award, even if the decree was in accordance with and not in excess of the award, if the appeal was on the ground that there was no agreement to refer, or on the ground that the award was not the award of the persons to whom the matter was referred. Either of those grounds would question the validity of the award, and, if sustained, would show that the Court which ordered the award to be filed had no jurisdiction under ss. 525 and 526 to

make the order to file the award. Our answer to this reference is that an objection to an application made under s. 525 that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. How far and under what circumstances a decision upon such an application might operate as *res judicata* may be gathered from the judgment of their Lordships of the Privy Council in *Muhammad Nawaz Khan v. Alam Khan* (1).

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Before Mr. Justice Blair and Mr. Justice Burkitt.

DURGA DIHAL DAS AND OTHERS (PLAINTIFFS) v. ANORAJI AND ANOTHER (DEFENDANTS).*

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July 31.

Civil Procedure Code, ss. 562, 564, 566, 622—Remand—Refusal of Court of first instance to record evidence tendered—Refusal of Appellate Court to record additional evidence.

THE plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs-respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was *held* that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiae* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record.

THE facts of this case sufficiently appear from the judgment of Blair, J.

* Second Appeal No. 1068 of 1893 from a decree of Kuar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 1st September 1893, reversing a decree of Munshi Tara Prasad, Munsif of Bansgaon, dated the 12th April 1893.

(1) L. R., 18 I. A. 73.

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Maulvi Muhammad Ishaq, for the appellants.

Maulvi Ghulam Mujtaba, for the respondents

BLAIR, J.—This is a case of considerable difficulty, because it is certainly not explicitly provided for by the Code of Civil Procedure. There was one issue, and one only, in the case, and that was whether or not a certain deceased Hindu had, up to the time of his death, continued to be a member of a joint Hindu family. The parties appeared before the Munsif and the plaintiff produced a quantity of documentary evidence which was admitted and acted upon by the Judge. The plaintiff had also present in Court to the knowledge of the Court a number of witnesses, whose oral evidence he was prepared to tender had it been necessary. The learned Munsif was satisfied with his own construction of the documentary evidence, and passed a formal order that it was unnecessary to have oral evidence upon either side. So far the plaintiff, seeing that the Munsif was prepared to decide it in his favor, should not have suffered injury; but the Munsif's decisions are appealable, and, except under the circumstances specified in s. 568 of the Code of Civil Procedure, he would be excluded from adding as a matter of right such evidence as had been tendered before and admitted by the Munsif. The defendant was clearly wronged, because he certainly ought to have had a hearing for his witnesses before the Munsif passed a decision against him. He might fairly say—"My case has not been tried at all," and the plaintiff may very properly say—"My case has not been properly tried, in so far as I have not been allowed to put in oral evidence, which I was entitled to do in the case." The matter passed to the appellate Court. It seems to me that the Munsif's action amounted to no trial at all. In the case of a formal, but wholly unreal trial and adjudication, there is not, as far as I am aware, any express power conferred upon this Court to compel him to perform his duty; but I cannot infer, having regard to the wide-reaching and most necessary duties imposed upon us as the highest judicial authorities in these provinces, that the High Court would be stepping outside its duty in compelling

the Munsif to the performance of his duties. There are cases to which my attention has been called, one decided by my predecessor, in which a case was sent back practically for a re-trial under circumstances which do not bring it within either s. 562 or s. 566 of the Code of Civil Procedure. There are cases which have been decided so lately as the present year, and which are reported in the Weekly Notes as having been decided by the learned Chief Justice, accompanied in one instance by a Judge now upon this Bench, and upon another occasion by another Judge. My brother Burkitt felt himself bound in the current year to apply a remedy in the cases which fall outside those sections of the Code of Civil Procedure to which I have referred. It seems to me that we must assume that the Code of Civil Procedure is not exhaustive. There are cases of misfeasance on the part of Judges below grosser than anything provided for in that Act. I decline to believe that those are cases where a High Court must fold its hands and allow obvious injustice to be done. In this case that which took place in the Court below seems to us the mockery of a trial, and when we come to the appellate Court we must confess that the treatment of the case, partly possibly by reason of the extreme defects which had characterised the hearing below, is very far from satisfactory. The appellate Court, it seems to us, ought not to have allowed itself to deal with the case upon the fragmentary materials before it, but ought, *ex debito justitiæ*, to have required evidence other than unexplained papers before coming to its decision. It matters little in point of view of the decision at which we have arrived that the learned Judge should have formed wholly erroneous notions about the inferences to be drawn by the entry in the revenue papers of a Hindu woman's name. Oral evidence would have been a proper corrective for such a misconstruction as that. The observation, which we apply to the action of the Court of appeal as well as to the Court of the Munsif, is that we conceive that in this case trial on paper evidence only falls far short of what we understand to be trial in a Court of Justice. The result is that I would quash the whole of the proceedings, both in the first appellate Court and in the Court of first instance, and direct the Munsif to restore this

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case to his list and try it upon the merits according to law, admitting for the purposes of that trial all admissible evidence tendered by either party. I would allow this appeal without costs, because it is not clear that any of the parties is substantially to blame in this matter.

BURKITT, J.—I concur in the order proposed by my learned brother and would only add that, notwithstanding the provisions of s. 564 of the Code of Civil Procedure, I do not see how any other course can be adopted in this case. That the plaintiffs-appellants have suffered palpable injustice at the hands of the lower Courts is manifest. The Court of first instance refused to hear their witnesses, not because it considered their depositions to be inadmissible, but because, having formed a strong opinion in favor of the plaintiffs on their documentary evidence, that Court considered it unnecessary to hear their witnesses. The Court of appeal, in what I am bound to say is in many ways a flippant and most unsatisfactory judgment, reversed the finding of the first Court on the only issue in the case, and remarked as to a point relating to that issue that the plaintiffs should have "proved it like any other issue," totally disregarding the fact that the plaintiffs had tendered evidence and that their evidence had not been put on record. This action of the lower Court did undoubtedly amount to a substantial error of procedure such as would allow of an appeal to this Court under s. 584 of the Code of Civil Procedure, and that error is the ground on which this appeal has been admitted. The difficulty we have felt is as to the way we should treat the appeal. It is not one to which the provisions of s. 562 of the Code of Civil Procedure apply. No preliminary point was decided by the lower Court and reversed by us in appeal, nor is it one in which we can remedy the defeat of the lower Court under s. 566, as it is impossible to say that the Court below has omitted to frame and try an issue. S. 568 is also inapplicable, inasmuch as, sitting as a Court of second appeal in this case, we have no power to come to any finding of fact. S. 622 is also inapplicable, as this is an appeal and not an application for revision. Nor indeed would any application for revision be

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admissible. The case thus falls outside of all the sections of the Code which treat of the procedure to be observed in remanding a case or in procuring additional evidence in second appeals, and therefore, though I am most unwilling to go beyond the provisions of s. 564, still I am constrained to hold, concurring with my learned brother, that, *ex debito justitiæ*, we are bound to make the order proposed by him.

Cause remanded.

Before Mr. Justice Blair and Mr. Justice Burdett.

SHANKAR LAL AND OTHERS (PLAINTIFFS) v DALIP SINGH (DEFENDANT).*

1894
August 6.

Act XII of 1881, s. 9—Occupancy tenant—Succession to occupancy tenant—Collateral—Sharer in cultivation.

WHERE a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy-holding during the lifetime of the deceased occupancy-tenant. But *non sequitur* that if there is a more remote collateral who was a sharer in the cultivation of the occupancy-holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. *Badri Das v. Debi Das* (1), referred to.

THIS appeal was referred to a Division Bench by an order of Banerji, J., dated the 10th of March 1894. The facts of the case sufficiently appear from the referring order, which is as follows:—

“In this case the property in suit formed the occupancy holding of a person of the name of Lalji. He died leaving the respondent, a collateral relative of his, who has been found by the Court below to have shared with him in the cultivation of his holding. He had also a nearer collateral relative, *viz.*, the father of the respondent, who did not share with him in the cultivation of his holding. The question which arises in this case is—whether the respondent was entitled to inherit the holding, his father, who is a nearer collateral relative of the deceased, being alive. This question is one of im-

* Second Appeal No. 1104 of 1893, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 28th July 1893, confirming a decree of Babu Shiva Prasad, Munsif of Bijnor, dated the 22nd March 1893.

(1) Weekly Notes, 1888, p. 200.

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portance and is not covered by authorities. I therefore refer the case to a Bench of two Judges."

Babu Jogindro Nath Choudhri for the appellants.

Mr. Abdul Majid for the respondent.

BLAIR, J.—This case has been referred to a Bench of two Judges on account of the importance of the question involved. It is substantially the same question as was raised in the first Bench before the learned Chief Justice and myself in Letters Patent Appeal No. 40 of 1893, dated the 24th July 1894. The judgment does not in terms rule upon the disputed question. The hearing of that case ended in an order of remand directing the Court below to find who, according to general Hindu Law, was the heir of the deceased occupancy-tenant. That remand is only comprehensible upon the supposition that we consider no person was qualified as successor in the occupancy-holding who did not combine with his claim as a sharer in the cultivation the further title as heir; and indeed in the course of the argument the interpretation which we put upon s. 9 of the N.-W. P. Rent Act, XII of 1881, was abundantly manifest. The question raised is this:—"Is a collateral who has shared in the cultivation of land subject to occupancy-tenure entitled on the decease of the tenant whose cultivation he has shared to inherit the occupancy-right in preference to a nearer collateral, who would be heir to the deceased under the ordinary Hindu Law, but who has not shared in the cultivation of the land in question?"

I have no doubt upon the wording of the section that one construction, and one only, can be put upon it. The first provision is that on the death of a person entitled to occupancy-tenure that right shall devolve as if it were land. That is precedent to every other condition. It means that the person to inherit must be one who would inherit if the property were immovable property of a totally different kind. Then is added a sentence of disqualification and not of qualification. The section goes on:—"Provided that no collateral relative of the deceased who did not then share in the

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cultivation of his holding shall be entitled to inherit under this clause." It seems to me upon the plain and ordinary construction of this section that it first of all specifies a class out of whom the successor must be taken, and then, in the case of some of such persons not having shared in the cultivation, it excludes them from the benefit they would otherwise derive as heirs. By a ruling to which my brother Burkitt has called my attention—*Badri Das v. Dabi Das* (1), my predecessors Straight and Mahmood, JJ., were both of them quite clear as to the interpretation to be put upon this section. I would, therefore, decree the appeal of the plaintiff, and set aside the decrees of both the lower Courts with costs, and give a decree for the plaintiff in the terms of the prayer in his plaint.

BURKITT, J.—I concur fully in the order proposed by my learned brother, and in the reasons given for it. Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs, it is, in my opinion, incumbent upon him to prove two things, *viz.*, first, that he is the heir according to the law to which he is subject, and secondly, that he shared in the cultivation of the occupancy-holding during the life-time of the deceased occupancy-tenant. Unless these two requisites be joined in one and the same collateral, such person cannot succeed to an occupancy-holding. The facts here are that the more remote collateral shared in the cultivation, while the nearer collateral (who, it so happens, is the father of the more remote collateral) did not so share, and the contention is that, to use a phrase of Hindu Law, the more remote collateral therefore excludes the nearer, which is a strange proposition. To this proposition I cannot accede. Under the words of s. 9 the right shall devolve as if it were land. I hold, therefore, that the person on whom that right devolves is the person indicated as heir by the law to which he is subject, and not a person more remote in the line of succession who may have shared in the cultivation with the deceased occupancy-tenant. As has been very properly remarked by

(1) Weekly Notes, 1888, p. 200.

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my learned brother, the condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral, even though he may have shared in the cultivation. For these reasons I concur in the order of my learned brother setting aside the judgment of the two lower Courts and giving plaintiff a decree as prayed for in his plaint.

Appeal decreed.

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August 7.

FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. FAZL AZIM.

Criminal Procedure Code, s. 531—Sessions Court—Jurisdiction—Appeal presented within, but heard outside the local limits of the jurisdiction of a Sessions Court.

A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. *Held* that the trial of the appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, the irregularity was covered by s. 531 of the Code of Criminal Procedure and did not render the trial of the appeal a nullity.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. Banerji for the applicant.

The Public Prosecutor (for whom Mr. W. K. Porter) for the Crown.

KNOX, BLAIR and BURKITT, JJ.—This is an application calling upon us to set aside an order passed by the Sessions Court of Bijnor-Budaun dismissing an appeal presented by one Fazl Azim who was convicted of offences under ss. 265 and 266 of the Indian Penal Code. The main contention urged upon our notice was that the order of the Sessions Judge was a nullity, it having been passed at Moradabad, a place outside the local limits of the Sessions division known

as the Bijnor-Budaun Sessions Division. It appears from the record that the appeal was presented at Bijnor, and there can therefore be no doubt whatever that the learned Sessions Judge had jurisdiction to entertain the appeal. The question therefore remaining for our decision is whether the order dismissing the appeal was a valid order or a nullity.

The Sessions division of Bijnor-Budaun was constituted by an order of Government, No. 545, dated the 12th of May 1880. Under that order and under s. 13 of Act No. X of 1872, the Local Government, from the 15th of May 1880, withdrew the district of Bijnor from the Moradabad Sessions Division and the district of Budaun from the Bareilly and Sháhjahánpur Sessions Divisions, and constituted the two districts thus withdrawn a new Sessions division to be called the Bijnor-Budaun Division. By a subsequent order a Sessions Judge was duly appointed to this division under s. 16 of Act No. X of 1872, and the Sessions division thus constituted continues to exist up to the present time.

It is an undisputed fact that Moradabad is situated without the local area of the Sessions division, and it is also undisputed that this appeal, though presented at Bijnor, was heard and orders on it passed at Moradabad. We have no hesitation in saying that the Sessions Judge did commit an irregularity in hearing the appeal outside the local area which constitutes his Sessions division, for it is a general and well-known rule that all judicial acts exercised by persons whose judicial authority is limited as to locality should be done within the locality to which such authority is limited. It is an irregularity which should not be allowed to recur. The further question which now arises is whether we are obliged by law to set aside the proceedings on the trial of the appeal, and the order on the appeal, as absolutely void by reason of that irregularity. The case *Empress of India v. Jagan Nath* (1) was cited to us as an authority for holding that the proceedings are void. It is a precedent which has been followed by several other cases decided by this Court, but, with all due deference to the learned Judge who decided that case, it appears to us that

(1) I. L. R., 3 All., 259.

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his judgment involved a confusion between ss. 70 and 83 of Act No. X of 1872, sections which have now been replaced by ss. 531 and 532 of the present Code. Our attention was also called to the case of *Queen-Empress v. James Ingle* (1), in which we think the law has been very correctly laid down by Mr. Justice Farran in the following words:—

Referring to s. 531 that learned Judge said:—

“This section, I think, must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of s. 532. Section 531 applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in the wrong local area; but s. 532 seems to refer to cases in which the Magistrate is competent to deal with the offences as having taken place within the local limits of his jurisdiction but has no power to commit to the High Court or Court of Sessions, either because he is only a second class Magistrate, or for some reason other than that of local jurisdiction.”

We understand that the meaning of the learned Judge is that s. 531 refers to irregularities arising out of the fact that the finding, sentence or order had been passed outside the geographical area of its jurisdiction by a Court otherwise competent, whilst s. 532 refers to a personal disability irrespective of area of jurisdiction. We have no doubt that the trial of this appeal in the Court of Sessions and the order dismissing it passed by the Sessions Judge come within the words “inquiry, trial or other proceeding”. The present case therefore falls within s. 531, and under that section no finding, sentence or order should be set aside unless it appears that the error occasioned a failure of justice. It is not contended in the present application that any failure of justice was caused. No other point was pressed upon us; and we therefore order that this application stand dismissed.

The order admitting Fazi Azim to bail will therefore be discharged, and Fazi Azim will be committed to prison to work out the rest of the sentence passed upon him on the 31st of March 1894.

(1) I. L. R., 16 Bom., 200.

APPELLATE CIVIL.

1894
August 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MUHAMMAD SULEMAN KHAN (JUDGMENT-DEBTOR) v. MUHAMMAD YAR KHAN AND OTHERS (DECREE-HOLDERS). *

Execution of decree—Decree as originally framed incapable of execution—Amendment of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Arts. 178, 179.

Where a decree as originally framed was found by the High Court to be incapable of execution and was not finally amended by that Court, so as to become capable of execution, until nearly twelve years after it was passed, it was held that an application to execute such decree which was made within three years from the date of the amendment of the decree was within time, the rule of limitation applicable being that prescribed by Art. 178 of sch. ii. of Act No. XV of 1877.

The first paragraph of the third column of Art. 179 only applies where there is a decree or order which can at its date be executed. That paragraph necessarily contemplates the existence of a decree capable of being executed at the date of the decree.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Murtaba* for the appellant.

Pandit *Sundar Lal* for the respondents.

EDGE, C. J., and BANERJI, J.—This is a somewhat peculiar case. The respondents in this appeal from an order on an application in the execution of a decree obtained in the Civil Court on the 24th of December 1878, a decree, which was affirmed in this Court in 1882, in a suit for possession of property. In 1883, on an application to execute that decree, possession was delivered to these respondents. In 1884 this Court held, on appeal from the order putting the respondents in possession, that the decree as it stood was incapable of execution. The decree in question was the decree in appeal of this Court. In 1884 an application was presented to this Court, for the amendment of the decree by bringing it into accordance with the judgment. That application was refused in 1884. In 1885 these respondents applied to the Court below to amend the decree. On that application an order to amend was

* First Appeal No. 311 of 1893, from an order of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 9th September 1893.

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made by the lower Court in 1885, but that order was set aside on appeal to this Court in 1889 on the ground that the decree in question being a decree by this Court, this Court was the only Court which could amend it. Thereupon, on the 5th of March 1889, these respondents applied to have the judgment of this Court, refusing the application to amend which was made in 1884, reviewed, and prayed that the decree might be amended. On the 6th of May 1890 the decree was amended on that application and brought into accordance with the judgment. On the 6th of May 1893, the application to execute the decree out of which this appeal has arisen was filed. The Subordinate Judge made an order for the execution of the decree.

It has been contended here, on behalf of the appellant, the judgment-debtor, that Art. 179 of sch. ii of the Indian Limitation Act, 1877, applies, and that even if the proceedings taken by these respondents on and prior to the 5th of March 1889 might be regarded as applications to take steps in aid of the execution of the decree, yet that this application is time-barred as not having been made within three years of the 5th of March 1889. It was also contended on behalf of the appellant that an application to amend a decree is not an application to take a step in aid of the execution of the decree, and that, although the decree was amended as late as the 6th of May 1890, the "date of the decree" mentioned in Art. 179 is the date which the Code of Civil Procedure enacts shall be the date of the decree, namely, the date of the judgment, which is that of the original judgment where there has been no review of judgment.

The following cases have been cited to us :—*Kalla Rai v. Fahi-man* (1), *Tarsi Ram v. Man Singh* (2), *Darbo v. Kesho Rai* (3) and *Thakur Das v. Shadi Lal* (4).

The question is not devoid of difficulty. On the one hand we have Art. 179, which is the only article which apparently expressly relates to the period of limitation for applications for execution of decrees. On the other hand there are undoubtedly cases of appli-

(1) I. L. R., 13 All., 124.

(2) I. L. R., 8 All., 492.

(3) I. L. R., 9 All., 364.

(4) I. L. R., 8 All., 66.

cations to execute decrees to which Art. 179 could not possibly apply. One such case was that of *Muhammad Islam v. Muhammad Ahsan* (1). It appears to us that the first paragraph of the third column of Art. 179 must necessarily apply only where there is a decree or order which can at its date be executed. It appears to us that that paragraph necessarily contemplates the existence of a decree capable of being executed at the date of the decree. In our opinion it would apply to a decree capable of being executed at its date, even though such decree might not be in accordance with the judgment, and although subsequently it might be necessary to make an application to bring the decree into accordance with the judgment. In our opinion, so long as there was, at the date of the decree, a decree capable of execution, the first paragraph of the third column of Art. 179 would apply. This Court in 1883 rightly or wrongly held that the decree of this Court of 1882 on appeal was, by reason of a defect in it, incapable of execution. That decision is binding on us, and for present purposes we must assume that the decree passed in appeal in 1882 affirming the decree of the lower Court of 1878 was, by reason of an infirmity in drawing it up, incapable of execution. Consequently it appears to us that until the 6th of May 1890, there was no decree in the suit between these parties which was capable of being executed. If Art. 179 were to apply to such a case as this, the decree-holder's power to obtain the fruits of a judgment in his favor might be defeated through no fault of his own by a Court delaying for more than three years from the date of its decree to bring the decree into accordance with its judgment and give the decree-holder a decree which he could execute. Article 179 applies not only to an application to execute an original decree, but it applies where there has been an appeal from that decree, and it applies also to a case in which there has been a review of judgment after decree. There is no provision in Art. 179 to meet a case in which at the date of the decree the decree, through the fault of a Court or the fault of an office in drawing it up or passing it, is incapable of execution. It appears to us that under these circumstances we must apply Art. 178, and we apply it because this Court

(1) Weekly Notes, 1894, p. 61.

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had decided that the decree of 1882 was absolutely incapable of execution. Under Art. 178 the respondents' application now under consideration is within time, for it was made, although on the last day of limitation, within three years from the time when the right to apply to execute the decree accrued on the amendment of the decree. No doubt with regard to any future application paragraph 4 of the third column of Art. 179 contains the limitation which will be applicable. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Burkitt.

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August 10.

KISHAN SINGH AND OTHERS (DECREE-HOLDERS) v. AMAN SINGH (JUDGMENT-DEBTOR).*

Civil Procedure Code, s. 258—Execution of decree—Limitation—Uncertified payment of part of decretal amount—Decree-holder entitled to give evidence of such uncertified payment in answer to a plea of limitation against execution of the decree.

Section 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. *Fakir Chand Bose v. Madan Mohan Ghose* (1), *Purmananddas Jivandas v. Vallabdas Walji* (2), *Sham Lal v. Kanahia Lal* (3), *Zakir Khan v. Bakhtawar* (4) and *Hurri Pershad Chowdhry v. Nasib Singh* (5) referred to.

THIS was an appeal arising out of an application by the present appellants to execute a decree dated the 10th of September 1885. The decretal debt was to be paid in twenty instalments. The first instalment was payable in Phagun, Sambat 1942, and the subsequent instalments in the months of Baisakh and Katik in each year. The decree-holders came into Court alleging that the first eight instalments had been paid at the stipulated dates, but that the

* Second Appeal No. 435 of 1894, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Mainpuri, dated the 26th February 1894, reversing a decree of Maulvi Syed Muhammad Abbas Ali, Munsif of Etah, dated the 17th December 1892.

(1) 4 B. L. R., (F. B.) 130.

(2) I. L. R., 11 Bom., 506.

(3) I. L. R., 4 All., 316.

(4) I. L. R., 7 All., 327.

(5) I. L. R., 21 Calc., 542.

judgment-debtor had made default in payment of the ninth instalment, which was payable in Katik, Sambat 1946, the last day of which corresponded to the 7th of November 1889. The application for execution was made on the 2nd of November 1892.

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The judgment-debtor objected to this application that he had not paid any of the instalments as agreed, and that the execution of the decree was time-barred.

The Court of first instance (Munsif of Etah) found that, even if default was made in payment of the instalments, execution of the decree was not barred, because, in case of default in payment of any of the instalments, the decree-holder was given an option to execute the decree for the realization of the whole sum remaining due, but that it was not necessary for him to do so, and it accordingly disallowed the judgment-debtor's objection.

The judgment-debtor appealed, and the lower appellate Court (Additional Subordinate Judge of Mainpuri) decreed the appeal, on the grounds, first, that inasmuch as the payments pleaded by the decree-holder had admittedly not been certified under s. 258 of the Code of Civil Procedure, they could not be taken cognizance of by the Court, and, secondly, that the decree-holder was by the terms of the decree bound to take out execution of the decree for the whole amount due thereunder within three years from the happening of the first default.

The decree-holders thereupon appealed to the High Court.

Mr. *J. N. Pogose*, for the appellants.

Munshi *Madho Prasad*, for the respondent.

BURKITT, J.—This is an appeal in an execution of decree case. The decree was one which directed the payment of the decretal amount by twenty half-yearly instalments on certain fixed dates, and it gave the decree-holders a power to execute the whole decree, or so much of it as was unpaid, on the occurrence of default in the payment of any instalment. The decree-holders have now applied, in pursuance of the power reserved to them, for execution in respect of the amount remaining due after the payment of the eighth

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instalment. Their allegation is that the judgment-debtor paid eight instalments regularly and then ceased paying, and they apply for execution for the whole sum remaining due under the decree. The judgment-debtor in reply denies that he paid any of the first eight instalments and sets up limitation as a bar. The lower Court has rejected the application for execution, chiefly on the ground that payment of the eight instalments alleged by the decree-holders to have been paid was not certified to the Court as required by s. 258 of the Code of Civil Procedure. The decree-holders appeal, contending that they were entitled to give proof of the payment of the eight instalments, even though those payments were made out of Court. For the respondent the last clause of s. 258 is relied on. On this point there is a long line of decisions, commencing with the Full Bench decision of the Calcutta High Court, reported in IV, Bengal Law Reports, Full Bench, page 130. It is true that that decision was passed under Act No. VIII of 1859, but, as remarked recently by the Bombay High Court, in the case of *Purmananddas Jiwan-das v. Vallabdas Wallji* (1)—“it is a distinct decision of a Full Bench of the Calcutta Court presided over by Sir Barnes Peacock that a judgment-creditor, seeking to enforce his decree, may avail himself of uncertified payments made by the judgment-debtor as an answer to a plea of limitation, and we are not aware that it has ever been questioned, nor has any change been introduced into the present Civil Procedure Code which militates against the grounds of the decision. We must therefore hold that effect may be given to the payments which have been admittedly made to the applicant for the purpose of evading the plea of the limitation.” The Calcutta Full Bench case has also been followed by this Court in *Sham Lal v. Kanahia Lal* (2) and in *Zakur Khan v. Bakhtawar* (3) and still more recently by the Calcutta High Court in the case of *Hurri Pershad Chowdhry v. Nasib Singh* (4), where the same view is expressed as by the Bombay High Court in the case above cited. This is a very strong current of authority, and, sitting as a single Judge of this Court, I think I am bound to follow it. Indeed, it seems to me

(1) I. L. R., 11 Bom., 506.

(2) I. L. R., 4 All. 316.

(3) I. L. R., 7 All., 327.

(4) I. L. R., 21 Calc. 542, at p. 549.

that the object of the prohibition in the last clause of s. 258 is to compel the *judgment-debtor* to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree if he desire that such payment should be recognised by the execution Court as against the decree-holder executing the decree. That prohibition does not, in my opinion, apply to a case like the present. For these reasons I am of opinion that the decree-holders ought to have been allowed to prove payment. There was on that point a distinct issue before the lower Court, as the decree-holders had asserted and the judgment-debtor had denied the payments. That issue ought to have been tried and decided. I remand the following issue under s. 566 to the lower appellate Court, *viz.* :—

Did the judgment-debtor pay all or any, and if so which, of the first eight instalments due on the decree, dated the 10th September 1885?

The lower Court will allow the parties to produce evidence on this point. After receipt of the finding ten days will be allowed for objections.

Issue referred under s. 566 of the Code of Civil Procedure.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

HAIDRI BEGAM (PLAINTIFF) v. NATHU (DEFENDANT) *

Act No. IV of 1882 (Transfer of Property Act), s. 106—Landlord and tenant—Suit in ejectment—Notice to quit—Denial of landlord's title by defendant before suit.

In a suit by a landlord for ejectment of a tenant, no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unhanna Devi v. Faikunta Hegde* (1) and *Dodhu v. Madhavrao Narayan Gadre* (2) referred to.

THE facts of this case are as follows :—

The plaintiff sued for the ejectment of the defendant from a house and for rent, alleging that the defendant had taken the house

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* Second Appeal No. 447 of 1894, from a decree of Maulvi Jabar Husain, Subordinate Judge of Bareilly, dated the 19th February 1894, confirming a decree of Maulvi Ahmed Ali, Munsif of Bareilly, dated the 25th January 1892.

(1) I. L. R., 17 Mad., 218. (2) I. L. R., 18 Bom., 110.

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on rent executing a lease on the 12th of July 1874, but, since the 12th of July 1889, had declined to pay the rent. The plaintiff had therefore sued the defendant for rent in the Small Cause Court, but the defendant denied that he was a tenant of the plaintiff, and, as the suit involved a question of ownership, it was dismissed by the Small Cause Court.

The defendant pleaded that the lease was inadmissible in evidence, not having been registered, and that, having been held to be concocted, the question of its genuineness could not be re-opened. He also pleaded that the claim for rent was *res judicata*, and that the house belonged to the defendant's brother; and lastly that the suit was unmaintainable, inasmuch as no notice, as required by s. 106 of Act No. IV of 1882, had been served upon him.

The Court of first instance (Munsif of Bareilly) dismissed the claim for ejectment, holding that the service of notice under s. 106 of the Transfer of Property Act, 1882, was essential, but decreed the claim for such portion of the rent as had not been the subject of the previous suit in the Court of Small Causes.

The plaintiff appealed; and the lower appellate Court (Subordinate Judge of Bareilly) dismissed the appeal upon grounds similar to those upon which the Munsif's judgment was based.

The plaintiff then appealed to the High Court.

Mr. *Abdul Raoof* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Medho Prasad*, for the respondent.

EDGE, C. J., and BANERJI, J.—The suit, out of which this appeal arose, was one for ejectment and also for arrears of rent. As to the claim for arrears of rent, that was barred under s. 13 of Act No. XIV of 1882 by the decision in a prior suit brought in a Court of Small Causes. It was contended here that as a Court of Small Causes could not have tried the suit for ejectment, its decision did not operate as *res judicata* *quod* the claim for rent. That is a mistaken contention. A Court of Small Causes is competent to

try this suit so far as it relates to the cause of action with reference to the rent, and the fact that the Court of Small Causes is not competent to try this suit so far as it is a suit for ejectment, does not make s. 13 of the Act inapplicable on the question of the rent. The suit, so far as the claim for rent was concerned, was rightly dismissed, and we dismiss this appeal, so far as it relates to the claim for rent, with proportionate costs.

The suit for possession of the house by ejectment of the defendant was dismissed on the ground that no notice determining the tenancy as required by s. 106 of Act No. IV of 1882 had been given. A notice was not necessary in this case, as, in the prior suit to which we have referred, this defendant had denied the plaintiff's title and denied that there was any contract of tenancy between them. The question as to whether in such a case a notice is necessary has been considered in several cases in this Court: but we think that the law is now well settled, and we cannot better express it than by quoting the judgment of Muttusami Ayyar and Best, JJ., in *Unhamma Devi v. Vaikunta Hegde* (1). What those learned Judges said was:—"Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to suit. It is also settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action; and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice." The same subject is referred to in the judgment in *Dodhu v. Madhavrao Narayan Gadre* (2). We set aside so much of the decisions of both the lower Courts as dismissed the plaintiff's suit for possession of the house, and we remand this case under s. 562 of Act No. XIV of 1882, to the Court of first instance for trial of the suit, so far as it relates to the house, on the merits. Costs of this appeal and in the Court below are allowed to the parties in proportion to their success.

Cause remanded.

(1) I. L. R., 17 Mad., 218.

(2) I. L. R., 18 Bom., 110.

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August 15.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KALI CHARAN AND ANOTHER (PLAINTIFFS) v. AHMAD SHAH KHAN
(DEFENDANT.)*

Mortgage Suit by second mortgagees against purchaser of equity of redemption who had paid off a prior mortgage—Second mortgagees ignoring lien of purchaser of equity of redemption.

One A. S. purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgaged property to sale, making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held* that such omission was not a valid reason for dismissing the plaintiff's suit altogether. *Salig Ram v. Harcharan Lal* (1) distinguished.

THE facts of this case were as follows:—

The plaintiffs brought their suit against two persons, Marjad Singh and Ahmad Shah Khan, alleging that the father of Marjad Singh had, on the 12th of April 1877, executed in their favor a bond for Rs. 200, hypothecating certain zamindari property, and subsequently on the 10th of January 1880, had executed a sale-deed by which he conveyed to the second defendant, Ahmad Shah Khan, the property mortgaged to them; and they prayed for realization of the mortgage debt, principal and interest, by sale of the mortgaged property.

Ahmad Shah Khan, the vendee-defendant, put in a written statement, in which he pleaded that he had bought the property in good faith and for an adequate consideration, without knowledge of the plaintiffs' mortgage, the sale having been made for the purpose of satisfying a mortgage on the property of a prior date to that of the plaintiffs. He alleged that the plaintiffs' suit was brought in bad faith with knowledge of the prior mortgage. He also pleaded adverse possession for more than 12 years, and that the plaintiffs' mortgage was a fictitious and collusive transaction.

* Second Appeal No. 1107 of 1893, from a decree of Maulvi Muhammad Anwar Hussain Khan, Subordinate Judge of Farukhabad, dated the 14th June 1893, reversing decision of Munshi Bakhtawar Lal, Munsif of Farukhabad, dated the 24th April 1893.

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The Court of first instance (Munsif of Farukhabad) found the issues as to limitation and fraud against the defendant. It found that the sale to the defendant Ahmad Shah was a valid transaction, and that the plaintiffs, though entitled to a decree for sale on their mortgage, could not bring the property to sale without first discharging the defendant's prior incumbrance, and gave the plaintiffs a decree accordingly. The defendant Ahmad Shah Khan appealed.

The lower appellate Court (Subordinate Judge of Farukhabad), finding that the defendant had paid off the prior mortgage as alleged by him and that the plaintiffs had wilfully omitted mention of this fact in their plaint, reversed the decree of the Munsif and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

BLAIR and BURKITT, JJ.—This is a suit by the holders of a second mortgage duly registered to recover by sale of the mortgaged property principal and interest due to them upon a bond executed in their favor by the second defendant. The first defendant and sole respondent here is the purchaser from the second defendant of the equity of redemption, and a certain amount of the purchase money was left with the vendee for the payment of a mortgage debt due under a mortgage of older date than that of the plaintiffs. It must be taken to be the fact that the plaintiffs had knowledge of such prior incumbrance. The second defendant by his purchase became full owner of the hypothecated land, subject to plaintiffs' mortgage; that is to say, the equity of redemption had passed to him, and the further equity arising out of his payment of the money due under the prior mortgage by which it had become extinguished. By virtue of his equity of redemption he had become entitled to relieve the land of the plaintiffs' second mortgage by payment, and by this payment, which extinguished the first mortgage, he was entitled to protect himself against a suit for sale instituted by the plaintiffs upon their second mortgage,

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because such payment unquestionably gave him a right to have, in priority to them, satisfaction of his lien, as though he stood in the shoes of the first mortgagee. But it would be incorrect to say that he was ever a mortgagee. The plaintiffs in their suit impleaded the mortgagor and his assignee, but made no mention of the lien acquired by defendant No. I. The lower appellate Court, reversing the decree of the Munsif, has refused on a plaint so drawn to allow the claim of the plaintiffs, subject to the repayment of the lien of defendant No. I, as decreed by the Munsif. The only question before us is whether upon account of the omission of all mention of the respondent's lien the suit ought to have been dismissed, although on a properly drawn plaint the plaintiffs would have been entitled to the decree given by the Munsif. Upon this preliminary point the plaintiffs' suit has been dismissed. The lower appellate Court acted upon the authority of the case of *Salig Ram v. Har Charan Lal* (1). The head-note correctly sums up the ruling in that case:—"Where a second mortgagee coming into Court and denying or ignoring the title of a prior mortgagee asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee." The *ratio decidendi* is thus expressed in the judgment:—"It is a suit brought on a false statement of facts or upon a suppression of material facts." In that case the defendant had been mortgagee prior to his purchase of the equity, and, had such purchase never taken place, must necessarily have been impleaded by a second mortgagee suing his mortgagor for enforcement of lien. The existence of such a mortgage must have been known to the second mortgagee and the rights of the first mortgagor perfectly understood. But the rights of the purchaser of an equity of redemption who had never been a mortgagee at all, but had obtained a right by repayment to use the first mortgage as a shield, are much less generally known and understood. Indeed the Munsif remarks that "it is likely that the plaintiffs' knowledge of the prior incumbrances and

(1) I. L. R., 12 All., 548.

of their discharge by the defendant-vendee caused to the plaintiffs doubt and uncertainty." This case does not appear to us to fall strictly within the ruling above quoted, and we are unable to lay down, as a rule of universal application, the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled. It seems to us that each case should be dealt with on its own merits. We reverse the finding of the lower appellate Court on the preliminary point, and remand the case to that Court under s. 562 of the Code of Civil Procedure with directions to restore it to its place on the register of first appeals and dispose of it upon the merits. This appeal is decreed with costs.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

GANGA DEI v. SHER SINGH.

Criminal Procedure Code, s. 195—Sanction to prosecute—Sanction in respect of an offence committed in the course of a civil suit of over Rs. 5,000 in value—Appeal.

Where sanction to prosecute is granted in respect of one of the offences referred to in s. 195 of the Code of Criminal Procedure, such offence having been committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie.

THE facts of this case are as follows :—

One Sher Singh, plaintiff in a civil suit before the Subordinate Judge of Sháhjahánpur, applied to the Subordinate Judge's Court for permission to prosecute the defendant in the suit, Ganga Dei, for making false statements in, and not giving proper answers to, interrogatories administered under s. 121 of the Code of Civil Procedure. On this application the Court gave sanction for the prosecution of the defendant in the following terms—"Under the reasons given in this Court's judgment, dated 27th June 1893, the Court grants permission to the plaintiff to prove in the Criminal Court the defendant's false statement or the offence under s. 188 of the Indian Penal Code, or both offences, against her."

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The defendant applied to the District Judge for revocation of the above order, but the Judge, holding that, inasmuch as the suit in the course of which sanction had been granted was valued at more than Rs. 5,000, he had no jurisdiction in the matter, dismissed the application.

The defendant thereupon applied to the High Court for revision of the Subordinate Judge's order.

Mr. J. Simeon, for the applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

BLAIR, J.—This is an application to this Court in the exercise of its revisional jurisdiction. In a civil suit before a Subordinate Judge for a sum largely in excess of 5,000 rupees certain interrogatories were alleged to have been falsely answered, or not properly answered, or not answered at all within the meaning of the Code of Civil Procedure. The learned Subordinate Judge who heard the suit granted sanction for the prosecution of the present applicant in terms which it is irrelevant here to discuss. Against that order the present applicant appealed to the District Judge. The learned District Judge rejected the appeal upon the ground that he had no jurisdiction to hear it. That order was based upon the impression that, the amount in dispute in the civil suit being such that an appeal in the civil suit was outside his jurisdiction, the learned Judge's Court was not the Court to which an appeal from the Subordinate Judge ordinarily lay within the meaning of s. 195 of the Code of Criminal Procedure. The learned Judge is mistaken. The amount at issue in the civil suit is wholly irrelevant. His Court was the ordinary Court of appeal from the decision in criminal matters made by the Subordinate Judge. The sanction in question was a sanction for criminal prosecution. The District Judge therefore was the proper tribunal to revoke or confirm such sanction. The order of the Judge dismissing the appeal is quashed. Let the case go back to the District Judge to hear and dispose of the appeal according to law. For the guidance of the District Judge he is referred to the Indian Law Reports, 2 Bombay, p. 384, and I. L. R., 2 Bom., p. 481.

APPELLATE CIVIL.

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November 1.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

BEHARI LAL PAL (DEFENDANT) v. SRIMATI BARAN MAI DAS
(PLAINTIFF).*

Civil Procedure Code, ss. 373, 43—Withdrawal of suit with permission to bring a fresh suit on the same cause of action—Effect of such withdrawal.

Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought.

A plaintiff, therefore, who has obtained an order under s. 373 of the Code will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw. *Venkata Shetti v. Ranga Nayak* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Becha Ram Bhattacharji* for the respondent.

EDGE, C. J., and BANERJI, J.—The suit in which this appeal has arisen was instituted on the 3rd November 1892, for rent due in respect of a village for the years 1297, 1298 and 1299 Fasli. The suit was brought upon a lease which reserved a lump yearly rent for the village. In the lease the village is described as containing 7,323 bighas, but the rent was not fixed per bigha. The plaintiff in the lower appellate Court obtained a decree for rent for the three years in question. One of the grounds in this appeal by the defendant is that the village in fact contained only 7,003 bighas, and he claims a proportionate deduction in respect of 320 bighas. It appears to us that the reference to 7,323 bighas was not intended or expressed as a warranty that the village contained in actual measurement 7,323 bighas. The rent was fixed irrespec-

* Second Appeal No. 797 of 1893, from a decree of J. Denman, Esq., District Judge of Banda, dated the 20th June 1893, modifying a decree of Munshi Syed Muhammad Jawad, Assistant Collector of Banda, dated the 28th February 1893.

(1) I. L. R., 10 Mad., 160.

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tive of the number of bighas and for the village *en bloc*. In our opinion the misdescription of the number of bighas in the village does not, under the circumstances, entitle the defendant to any deduction.

A prior suit had been brought by the plaintiff against the defendant upon the same lease to recover the rent of the village for 1296, 1297 and 1298 Fasli. At the time when that prior suit was brought the rent for 1299 Fasli had accrued due and was payable, and could have been claimed in that suit. That prior suit was withdrawn by the plaintiff on an application for that purpose, and liberty was granted to him to bring a fresh suit. That application was made, and that permission was granted, under s. 373 of Act No. XIV of 1882. It appears that the defendant had no notice of that application, and that the order giving permission to withdraw and bring a fresh suit was made behind the back and without the knowledge of the defendant and without his having an opportunity of being heard. The order, however, was made and is final. In our opinion the defendant cannot, in this suit, question the validity of that order. It is true that the order was apparently not appealable, but the defendant was not left without his remedy if he wished to challenge that order by proper procedure.

We now come to the more difficult question in this appeal. Part of the claim in this suit is for rent for 1299 Fasli, which might have been included by the plaintiff in his prior suit, and, no doubt, if the plaintiff had obtained a decree in that prior suit, the illustration to s. 43 of Act No. XIV of 1882 would have covered the present claim for rent for 1299 Fasli, and it could not have been maintained in this present suit. It appears to us that if the prior suit had been withdrawn without permission granted under the first paragraph of s. 373 of Act No. XIV of 1882, section 43 of that Act would have applied and would have barred any remedy in the present suit for rent for 1299 Fasli. It has been held by the Madras High Court in *Venkata Shetti v. Ranga Nayak* (1) that where a suit is withdrawn under s. 373 with permission to bring a fresh suit, the

(1) I. L. R., 10 Mad., 160.

effect of such permission is to leave matters in the position in which they would have stood if no such suit had been instituted. Our attention has also been drawn to the decisions of this Court in *Ilahi Bakhsh v. Imam Bakhsh* (1) and in *Mul Chand v. Bhikari Das* (2).

The question is not free from difficulty, but we are not inclined to differ from the view expressed by the Madras High Court in the case to which we have referred, and we think that it is most probable that the Legislature intended that when a suit was withdrawn with permission under the first paragraph of s. 373 of Act No. XIV of 1882, the effect should be to leave the parties in the same position as that in which they would have been if the suit had never been brought. This view is supported by s. 374 of Act No. XIV of 1882.

The appeal fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

REFERENCE UNDER ACT No. I OF 1879 (INDIAN STAMP ACT), s. 49.

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November 16.

Act No. I of 1879 (Indian Stamp Act), s. 3, cl. (13), s. 7—Stamp—Lease or mortgage.

A zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and grass by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles: *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte Hill* (3) referred to.

THIS was a reference under s. 49 of Act No. I of 1879, made by the Munsif of Saharanpur for the purpose of obtaining a decision as to the correct stamp to be placed upon a certain document.

(1) I. L.R., 1 All., 324.

(2) I. L.R., 7 All., 624.

(3) I. L.R., 8 Calc., 254.

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The document in question was thus described in the Munsif's order of reference :—"The lease provides for the payment of Rs. 365 per annum in cash, and a cart-load of straw and a cart-load of grass as zamindari dues for eight years, and also provides that for the amount payable every year under the lease the property described below is pledged and hypothecated (*maqful aur mustagharaq*), and that the said property will not be transferred to any one in any manner, and, if transferred, such a transfer would be regarded as void."

The document was stamped as a lease with a stamp of the value of Rs. 4 and the question referred was whether the document ought to have been stamped as a lease or as a mortgage-deed or as both, and what was the amount of stamp duty with which it was chargeable.

The following order was passed on this reference :—

EDGE, C. J., KNOX and BANERJI, JJ.—This is a reference by the Munsif of Saharanpur under s. 49 of the Indian Stamp Act of 1879. The question is whether a document produced before him at the trial was chargeable with duty as a lease or was chargeable with duty as a mortgage-deed. There was a further question submitted to us, namely, in case the document was a lease and also a mortgage-deed, did it fall within paragraph 2 of s. 7 of the Indian Stamp Act, that is, was it chargeable with duty only as a mortgage-deed, that being the higher duty?

The document in question was stamped as a lease. The document in question was a document by which the zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and of grass, valued by the Munsif at Rs. 10 per annum, for eight years, as zamindari dues. The lessees by the deed hypothecated certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the articles valued by the Munsif at Rs. 10 per annum. It appears to us that the document was certainly a

mortgage-deed, as a mortgage-deed is defined in clause 13 of s. 3 of the Indian Stamp Act of 1879. It is an instrument by which, for the purpose of securing a future debt, that is, the rent to be paid, and for securing the performance of an engagement, that is, the engagement to pay the rent and to deliver the other articles yearly, the lessees created in favor of the lessor a right over specified property.

As to the second question, in our opinion the document in question cannot be regarded as an instrument comprising or relating to several distinct matters. The matter to which the instrument relates was the terms upon which the lessors let the land and the lessees took the holding. The mortgage was not a distinct matter from the lease. It was as much the matter of the lease as an ordinary covenant to pay would be part of the matter of the lease. We are consequently of opinion that paragraph 2 of s. 7 of Act No. I of 1879 applies to this case. We are fortified in this opinion by the decision of the Calcutta High Court in *Ex parte Hill* (1). The papers will be returned to the Munsif through the District Judge with this expression of our opinion. There are some independent papers which have been sent up with the document we have expressed our opinion upon, but there is nothing to show whether those papers are relevant or not. The opinion which we express is simply on the document in question.

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APPELLATE CRIMINAL.

1894
November 17.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. TAJ KHAN AND OTHERS.

Criminal Procedure Code, ss. 161, 162—Use at trial in Sessions Court of statements made to Police officer investigating case—Evidence.

Though, speaking generally, statements, other than dying declarations, made to a Police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may

(1) I. L. R., 8 Calc., 254.

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be shown by the evidence of the Police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the Police officer he would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it) cannot be used as direct evidence of what was stated by the witness to the Police officer.

Such statements as above described made as to the presence of an accused person at the commission of an offence and not being statements to which the second paragraph of s. 162 of the Code of Criminal Procedure applies, cannot legally be used as evidence against the accused.

THE facts of this case are fully stated in the judgment of the Court.

Babu Satya Chandar Mukerji, for the appellants.

The Public Prosecutor (*Mr. A. Strachey*), for the Crown.

EDGE, C. J., and BANERJI, J.—Eighteen men were convicted of the offence punishable under s. 302 of the Indian Penal Code by the application of s. 149 of that Code. Those eighteen men have appealed.

The undoubted facts are that there was ill-feeling existing between the Muhammadans of the village of Sewanpur and those of the village of Kanoi. Some time before the date on which the murder in question was committed, one of the Muhammadans of Sewanpur had been killed by Muhammadans from the village of Kanoi. The man who was killed was the uncle of Taj Khan who is one of the men convicted in this case. For that murder some of the Kanoi Muhammadans have been punished. On the 8th of April last, the Muhammadans of the neighbouring villages assembled on the occasion of the *Id-ul-fitr* at the *Idgah* of the mosque at Sahawar. On that occasion about fifteen men from the village of Kanoi and a large number, estimated at from sixty to seventy, of the Muhammadans of Sewanpur also assembled. The evidence shows that of the large crowd of Muhammadans assembled at the mosque the men from Sewanpur were the only men armed with *lathis*. The Kanoi men were unarmed. It is also beyond dispute that on that occasion, and close to the *Idgah*, the men from Sewanpur, or some of them, attacked with their *lathis* the men from Kanoi, and that that attack was made without any provocation. It is

further beyond dispute that Chaddan Khan, one of the Kanoi men, was severely beaten by the Sewanpur men with *lathis* and that he died from the results of the injuries which he received. It is also beyond doubt that several other of the Kanoi Muhammadans received injuries more or less severe from *lathi* blows inflicted by the Sewanpur Muhammadans on that occasion.

There were nineteen men from Sewanpur put on their trial before the Sessions Judge: one was acquitted, the others were convicted. We have now to decide what was or what were the offence or offences committed on that occasion, and which of these eighteen men were proved to have been guilty of committing an offence on that occasion.

Before dealing shortly with the evidence, as we propose to do, it is necessary to refer to some evidence which was made use of against some of these men at the Sessions trial. It so happened that the Sub-Inspector who was in charge of the neighbouring *thana* was present when the attack on the Kanoi men was made. Immediately after that attack he asked the wounded men for information. Whether it was for information as to the particular men who assaulted them, or whether it was for information as to the Sewanpur men who were taking part in the attack generally, is not very clear. Each of the wounded men made to the Sub-Inspector a statement, and each of those men who happened to be examined at the Sessions trial very considerably enlarged in his evidence at the trial on the statement made to the Sub-Inspector by giving more names of assailants.

The Sessions Judge in convicting these eighteen men appears to have relied, as against some of them at least, on the fact that they had been mentioned to the Sub-Inspector on the 8th April, by the wounded men of Kanoi. Mr. *Satya Chandar Mukerji*, who appeared here for these eighteen appellants, contended, and we think rightly, that the statements, with the exception of that of Chaddan Khan, which were statements other than dying declarations, fell within the prohibition of the first paragraph of s. 162 of the Code of Criminal Procedure. The last paragraph of that section did not apply to these statements. These statements were made to the

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Sub-Inspector by persons in the course of an investigation by him under Chapter XIV of the Code of Criminal Procedure, and, as the second paragraph of s. 162 did not apply to them, we are of opinion that they cannot legally be used as evidence against the accused.

Mr. *Satya Chandar Mukerji* also contended, and we think rightly, that the first paragraph of that section does not prohibit using in favor of an accused person the statements to which that paragraph relates. Generally, we agree with that contention, but the statements can only be used in favor of an accused person when the statements are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the Police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at that time reduced into writing by the Police officer, the officer would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the Police officer. We mention this, as Mr. *Satya Chandar Mukerji* has relied upon the fact that with regard to some of these men the evidence given by them at the trial varied from their statements made to the Sub-Inspector or went considerably beyond them. He has asked us not to attach credit to the evidence of those witnesses.

The first case with which we propose to deal is that of *Ewaz Khan*. It appears that the only one of the *Kanoi* men who mentioned to the Sub-Inspector at the time that *Ewaz Khan* was one of the attacking party was *Fajju Khan*. *Fajju Khan* was examined before the Magistrate, but does not appear to have been examined at the Sessions trial, and further, his deposition before the Magistrate does not appear to have been made part of the record of the Sessions trial. Owing to that omission we are of opinion that it is safer to give *Ewaz Khan* the benefit of the doubt and to acquit him, although he was spoken to by some of the witnesses at the Sessions trial.

We set aside the conviction and sentence passed upon Ewaz Khan, and acquit him of the charge of which he was convicted, and direct that he be forthwith released.

One of the witnesses examined at the Sessions trial who had made a statement to the Sub-Inspector was Nur Khan. He mentioned to the Sub-Inspector, on the 8th of April, the names of seven men as having been engaged in the attack. At the Sessions trial he swore positively that the whole nineteen men then on trial were engaged in the attack. It seems to us that Nur Khan, by the time the Sessions trial arrived, had made up his mind to swear to men having been present on the 8th of April, whom, on the 8th of April, he had not seen in the attack. Three of the convicted men, *viz.*, Naim Khan, Bhure Khan and Asad Khan, were named on the 8th of April by Nur Khan only to the Sub-Inspector. At the Sessions trial other men of the Kanoi witnesses, who had not mentioned those men's names to the Sub-Inspector, swore to them as having been of the attacking party.

There was another witness examined at the Sessions trial who had made a statement to the Sub-Inspector on the 8th of April, to whom we shall now refer. This witness was Man Khan. He was the only one of the Kanoi men who, on the 8th of April, mentioned the convict Sallu Khan as one of the attacking party. Man Khan told the Sub-Inspector that four men had attacked him with *lathis* and that the first blow was given by Taj Khan. At the Sessions trial he mentioned the names of two men as having attacked him with *lathis*, and he did not suggest that Taj Khan had struck him at all, or had ever been nearer to him than a distance of eight or ten yards. We do not think that it would be safe to rely on the evidence of Man Khan or Nur Khan, and, as the four men last named by us, *viz.*, Naim Khan, Bhure Khan, Asad Khan and Sallu Khan, were at the time mentioned only by one or another of those two witnesses, we give them the benefit of the doubt, and, acquitting them of the offences of which they have been convicted, we set aside the convictions and sentences, and direct that they be forthwith released.

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We have now to deal with the case of Taj Khan, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi Khan.

It is proved to our satisfaction that Taj Khan was the man who gave the order to his fellow-villagers to attack the Kanoi men, and that he, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi attacked Chaddan Khan of Kanoi with their *lathis* and inflicted on him such serious injuries as to result in his death. We have no doubt that these four men were properly convicted of murder and sentenced under s. 302 of the Indian Penal Code. We dismiss the appeals of Taj Khan, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi Khan.

There remain nine men whose cases have to be disposed of. We do not believe that the common object of the Muhammadans of Sewanpur was to commit murder, nor do we think that any one of these nine men knew that murder was likely to be committed in the attack on the men of Kanoi. We believe that the common object was to attack the Kanoi men with *lathis* and to inflict on them serious injury, such bodily injury as might be likely to cause death, but we do not think that common object was to commit the offence of murder as defined in s. 302 of the Indian Penal Code.

We alter the convictions of these men to convictions under s. 304, read with s. 149 of the Indian Penal Code. Although we do not believe that the common object of this unlawful assembly was to commit murder, we believe the undoubted object was to inflict serious injury on the Kanoi men. The Sewanpur men took their opportunity of having their revenge. The Sewanpur men came to the *Idgah* armed with *lathis*, probably knowing that the Kanoi men would be unarmed. They obeyed the order of their leader and joined in the attack which resulted in the offence committed by these nine men.

We think, however, that it is not necessary that these men should be transported for life, and altering their convictions we also alter their sentences, and sentence Daraz Khan, Badulla Khan, Shahamat Khan, Amanat Khan, Badal Khan, Chunni Khan, Dildar Khan, Ghafur Khan and Man Khan to be rigorously imprisoned for seven years.

APPELLATE CIVIL.

1894
December 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

LACHMI NARAIN AND OTHERS (DEFENDANTS.) v. MUHAMMAD YUSUF
(PLAINTIFF).*

Mortgage—Act No. IV of 1882 (Transfer of Property Act), s. 60—Breaking up of security—Mortgagee allowing mortgagor to pay a portion of the mortgage debt and releasing part of the mortgaged property.

A mortgagee by allowing his mortgagor to pay a portion of the mortgage-debt and releasing a proportionate part of the mortgaged property does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece-meal. *Marana Ammanu v. Pendyala Perubotulu* (1) and *Subramanyan v. Mandayan* (2) not followed.

THE facts of this case as stated in the judgment of the Court of first instance are as follows :—

One Mukand Singh was owner of $2\frac{1}{2}$ biswas in mauza Chhalesar and of shares in a large number of other villages.

He first, on the 12th of February 1878, jointly with his nephews, Jawahar Singh and Karan Singh, mortgaged the $2\frac{1}{2}$ biswas in mauza Chhalesar, together with shares in other villages, to Lachmi Narain and others for Rs. 40,000 and executed a mortgage-deed. Again on the 31st of May 1878, Mukand Singh mortgaged the same $2\frac{1}{2}$ biswa share in mauza Chhalesar with shares in other villages to Sukh Ram for Rs. 4,480, and executed a mortgage-deed. Subsequently, on the 20th of March 1880, Mukand Singh mortgaged for the third time the $2\frac{1}{2}$ biswas in mauza Chhalesar to the plaintiff, Muhammad Yusuf, the mortgage-deed being written in the name of Jani Bijai Shankar. The first and second mortgagees sued for sale on their mortgages and obtained decrees in their favor on their respective mortgages. The plaintiff sued for redemption of the share in mauza Chhalesar above mentioned upon payment by him of the proportionate amount which might be considered to have been decreed in respect thereof in the prior mortgagees' suits, and for sale of the

* First Appeal No. 47 of 1893, from a decree of Maulvi Muhammad Mazhar Husain, Additional Subordinate Judge of Aligarh, dated the 8th November 1892.

(1) I.L.R., 3 Mad., 230.

(2) I.L.R., 9 Mad., 453.

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[share in satisfaction of the amount due to him and the sums which he would have to pay to the first and second mortgagees. The plaintiff also impleaded certain subsequent mortgagees of the same property.

The first set of mortgagees pleaded that the plaintiff's mortgage was fictitious and collusive and without consideration. They alleged that Mukand Singh, Kharan Singh, Jawahar Singh, Sher Singh and Naubat Singh had mortgaged 10 biswas of mauza Chhalesar to them, and that Sher Singh and Naubat Singh had paid half of the mortgage money and redeemed half the property, and that in consequence of this transaction the claim to redeem by payment only of a proportionate share of the mortgage money, and not a moiety thereof and interest, was improper. They also pleaded that the account and the proportionate shares of the mortgage money had been wrongly calculated by the plaintiff; that the claim was bad for misjoinder of defendants, and that the claim for interest after due date was bad in law.

The representatives of the second mortgagee pleaded that his claim was prior to that of the plaintiff; that as the mortgage was a joint mortgage the whole amount due under it should be paid by the plaintiff; and that the amount of the proportionate share stated by the plaintiff was incorrect.

The remaining defendants did not appear.

The Court of first instance (Additional Subordinate Judge of Aligarh) found on the various issues as to the genuineness of the plaintiff's mortgage that the bond sued on was a genuine bond executed by Mukand Singh in the name of Jani Bijai Shankar, but in reality for the benefit of the plaintiff; and, as to the issue whether the plaintiff was entitled to redeem upon payment of a proportionate part of the mortgage money, that, as to the first mortgage, Sher Singh and Naubat Singh had in fact, as alleged, paid half the mortgage money and redeemed half the property, and, as to the second mortgage, that Sukhran, the original mortgagee, had in execution of his decree on the mortgage brought

to sale a part of the mortgaged property only and purchased it himself. The Court therefore came to the conclusion that both the prior mortgages had been broken up so as to admit of the plaintiff claiming redemption on payment of a proportionate share only of the mortgage money.

On the question of the proportionate amounts due on the two mortgages, the Court found that Rs. 1,447-8-0 was due on the first mortgage and Rs. 6,445 on the second mortgage and passed a decree in favor of the plaintiff.

The first set of mortgagees appealed to the High Court.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the appellants.

Mr. *Hameed-ullah* and Mr. *Abdul Majid*, for the respondent.

EDGE, C. J., and BANERJI, J.—The only question before us in this appeal is whether the defendants-appellants, having received from the mortgagor a moiety of the mortgage-debt, and having, on that payment, released a moiety of the mortgaged property, have thereby broken up their mortgage so as to allow the plaintiff to redeem that portion of the mortgaged property in which he is interested by payment of a proportion of the mortgage-debt still due to these defendants-appellants. The rule as to the redemption of a portion of mortgaged property on payment of a proportion of the mortgage-debt which has been acted on in these provinces since the passing of Act No. IV of 1882 is to be deduced from the last paragraph of s. 60 of that Act. We may say that before the passing of Act No. IV of 1882, the principle to be deduced from the last paragraph of s. 60, to which we have referred, was the principle, so far as we are aware, which was applied in these provinces, and the right to redeem adversely a portion of the mortgaged property by payment of a proportionate part of the mortgage-debt was, when not stipulated for in the contract, confined to cases in which the mortgagee or mortgagees had acquired, in whole or in part, the share of a mortgagor. Mr. *Abdul Majid*, for the respondent, has contended that whenever the mortgagee receives payment of a portion of the mortgage-debt, and in consideration of such payment

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releases from the mortgage part of the property mortgaged, he breaks up the contract of mortgage and the mortgagor or any person interested in the mortgaged property becomes entitled to redeem a portion or portions piece-meal by payment of a proportionate amount of the debt remaining due; and he cited as authorities for that proposition, *Marana Ammanna v. Pendyala Perubotulu* (1) and *Subramanyan v. Mandayan* (2). All we need say as to the case of *Marana Ammanna v. Pendyala Perubotulu* is that it was decided before the coming into force of Act No. IV of 1882. The decision in the case of *Subramanyan v. Mandayan* apparently followed the decision in *Marana Ammanna v. Pendyala Perubotulu*. In our opinion it would be contrary to public policy to hold that a mortgagee, by allowing a mortgagor to pay off a portion of the mortgage-debt and so release a portion of the mortgaged property, broke up the mortgage contract so as to allow the mortgagor or any one else interested to redeem the remainder of the mortgaged property piece-meal. If such were the law, a hardship would be imposed on mortgagors, for mortgagees would undoubtedly refuse to receive from mortgagors part payment of a debt on condition of releasing a part of the mortgaged property. In this case the plaintiff must redeem the mortgage of these defendants-appellants,—he is a puisne mortgagee. The Court below ascertained that on the 19th March 1892, which was the day on which the suit was instituted, the total amount remaining due to these defendants-appellants on their mortgage was Rs. 98,989-12-0, and on that basis arrived at a sum of Rs. 4,997-8-0 which was fixed as the proportionate amount to be paid by the plaintiff. The plaintiff has not challenged the correctness of those figures as ascertained by the Court below, and consequently we take them as the basis of our decree.

We vary the decree of the Court below so far as the plaintiff and these defendants-appellants are concerned by decreeing that the plaintiff shall be entitled to redeem the mortgage of the 11th February 1878, at present vested in these defendants-appellants, by

(1) I. L. R., 3 Mad., 230.

(2) I. L. R., 9 Mad., 453.

payment into Court on or before the 5th June 1895, of the sum of Rs. 98,989.12 0 with interest thereon at the rate of six per cent. per annum from the 19th March 1892 to date of payment, and that on such payment these defendants-appellants shall deliver up to the plaintiff, or to such person as he may appoint, all documents in their possession or power relating to the mortgaged property, and shall assign to the plaintiff the mortgage of the 11th February 1878, free from all incumbrances created by the defendants-appellants or any person claiming under them, or by those under whom they or any of them claim as mortgagees, and that if such payment be not made on or before the 5th June 1895, the plaintiff shall be absolutely debarred from all right to redeem these defendants-appellants or to sell any portion of the property mortgaged to them.

The defendants-appellants shall have their costs of this appeal and their costs in the Court below to be paid by the plaintiff.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

QUEEN-EMPRESS v. ISHRI.

Criminal Procedure Code ss 106, 423—Security to keep the peace—Appellate Court not competent to require such security—Sentence, powers of appellate Court in respect of.

The Magistrate of a district acting as an appellate Court in criminal cases cannot make an order under s. 106 of the Code of Criminal Procedure. *Aslu v. The Queen-Empress* (1), and *Queen-Empress v. Lachman* (2) referred to.

Where a District Magistrate acting as an appellate Court in a Criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of Rs. 10 or in default a further term of six weeks' rigorous imprisonment; *held* that as the latter sentence might involve an enhancement of the former such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure.

This was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Agra. The facts of the case sufficiently appear from the judgment of the Court.

(1) I. L. R., 16 Cal., 773.

(2) Weekly Notes 1893, p. 201.

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The Government Pleader (Munshi Ram Prasad) for the Crown.

EDGE, C.J. and BLAIR, J.—A Deputy Magistrate convicted Ishri and others of the offences punishable under ss. 225B and 342 of the Indian Penal Code, and for the offence under s. 225B he sentenced the accused to three months' rigorous imprisonment, and further he sentenced them to four months' rigorous imprisonment in respect of the offence under s. 342. They appealed. The appeal was heard by the District Magistrate of Agra. He maintained the convictions, but altered the sentences. He sentenced them to three months' rigorous imprisonment and a fine of ten rupees, or, in default, 6 weeks' rigorous imprisonment for the offence under s. 225B, and to three months' rigorous imprisonment and a fine of ten rupees, or, in default, 6 weeks' rigorous imprisonment for the offence under s. 342. He also ordered the accused to enter into their personal recognizances in Rs. 100 with two sureties in Rs. 50 each to keep the peace for one year, or, in default, to undergo simple imprisonment for one year. It has been rightly held by the High Court of Calcutta in *In re Aslu v. The Queen-Empress* (1), and by this Court in *Queen-Empress v. Lackman* (2) that the Magistrate of a district when acting as an appellate Court in criminal cases cannot make an order under s. 106 of the Code of Criminal Procedure. Consequently the orders in respect to recognizances are bad, and, so far as the recognizances are concerned, they are quashed. The bonds, if given, are to be returned.

It appears to us that the Magistrate of the district exceeded his jurisdiction under s. 423 of the Code of Criminal Procedure in respect of the sentences under s. 225B. of the Indian Penal Code in this way. He maintained the sentence of three months' rigorous imprisonment under that section, and added to it a fine of ten rupees, or in default six weeks' rigorous imprisonment. That was clearly an enhancement of the sentence. The Magistrate also, in our opinion, enhanced the sentences passed under s. 342 of the Indian Penal Code. It is true that he reduced the sentence of four months' rigorous imprisonment to one of three months' rigorous imprison-

(1) I. L. R., 16 Cal., 779.

(2) Weekly Notes 1890, p. 201.

ment, but he added to the sentence a sentence of a fine of ten rupees, or in default six weeks' rigorous imprisonment. The result might be that, if the ten rupees were not paid, each of these men would have to undergo practically four months and two weeks' rigorous imprisonment instead of four months' rigorous imprisonment for the offence under s. 342. We set aside so much of the orders of the District Magistrate as related to the fines, and the fines, if paid, must be returned at once.

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APPELLATE CIVIL.

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December 11.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

DWARKA DAS (PLAINTIFF) v. KAMESHAR PRASAD AND ANOTHER
(DEFENDANTS).*

Civil Procedure Code, s. 283 - Jurisdiction—Valuation of suits—Act No. XII of 1887 (Bengal, &c., Civil Courts Act) ss. 19, 21—Act No. 1 of 1887 (General Clauses Act) s. 3, cl. (13).

When the only parties to a suit under s. 283 of Act No. XIV of 1882 are the execution-creditor or his representative on one side, as plaintiff or as defendant, and the claimant-objector or his representative on the other, and the sole question in the suit between such parties is the question whether the property attached in execution of the decree of the execution-creditor is or is not liable to be attached and sold in execution of the decree of the execution-creditor, the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887, which, by cl. (13) of s. 3 of Act No. I of 1887, means "the amount or value of the subject matter of the suit," is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property, and the value of so much of the property sought to be sold as will on a sale satisfy the amount sought to be realized by the sale, when the value of the property attached exceeds the amount sought to be realized, and that in such latter case the amount which it is sought to realise by a sale under the decree may be taken as the value of that portion of the property the sale of which will theoretically, although possibly not in practice, be sufficient to satisfy the amount sought to be realised by a sale.

But when in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative party as defendant to the suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887

* First Appeal No. 291 of 1893, from a decree of Babu Nilmadhub Rai, Subordinate Judge of Benares, dated the 14th March 1893.

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must be the value of the property attacked, whether such value exceeds or is less than the amount which is sought to be realized by the sale of the property in execution of the decree.

Gulzari Lal v. Jadaun Rai (1), *Durga Prasad v. Rachla Kuar* (2), *Krishnama Chariar v. Srinivasa Ayyangar* (3), and *Modhusudan Koer v. Rakhal Chunder Roy*, (4), distinguished. *Mahabir Singh v. Behari Lal* (5) and *Madho Das v. Ranji Patil* (6) referred to.

The facts of this case are fully stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C. J. and BANERJI, J.—This is an appeal brought by Babu Dwarka Das, the plaintiff in the suit, from the decree of the Subordinate Judge of Benares dismissing the suit with costs.

The memorandum of appeal had been originally presented to the Court of the District Judge of Benares. The District Judge returned the memorandum of appeal to the plaintiff for presentation to this Court, holding that the appeal lay to this Court and not to the Court of the District Judge. The plaintiff thereupon presented the memorandum of appeal to this Court; the memorandum of appeal was admitted and the appeal was registered under section 548 of Act No. XIV of 1882.

Upon the appeal being called on for hearing, Mr. *Madho Prasad*, vakil for the appellant, contended that the appeal lay to the Court of the District Judge, and not to this Court, and that we should return the memorandum of appeal to the appellant for presentation by him to the Court of the District Judge of Benares. On the other hand Mr. *Jogindro Nath Chaudhri*, for the respondent, contended that the appeal lay to this Court.

The facts material to the question of jurisdiction are as follows:—

The respondent Babu Kameshar Prasad had obtained, on the 20th of August 1881, in the Court of the Subordinate Judge of

(1) I. L. R., 2 All., 799.

(2) I. L. R., 9 All., 140.

(3) I. L. R., 4 Mad., 339.

(4) I. L. R., 15 Calc., 104.

(5) I. L. R., 13 All., 320.

(6) I. L. R., 16 All., 286.

Benares a decree for money against Puran Chand, since deceased, and Daru Mal, and in execution of that decree [he obtained, on the 13th of December 1889, attachment of a house and a bungalow, which, he alleged, had been the property of Puran Chand in his lifetime and were, according to him, then in the possession of the respondent Sahudra Bibi as the representative of Puran Chand. Babu Dwarka Das filed an objection to the attachment alleging that the property was his, and was not liable to be attached and sold in execution of the decree of Babu Kameshar Prasad.

The Subordinate Judge disallowed the claim of Babu Dwarka Das, and thereupon Babu Dwarka Das, under section 283 of Act No. XIV of 1882, brought the suit in which this appeal has arisen, making Babu Kameshar Prasad, as the execution-creditor, and Musammat Sahudra Bibi, as the representative of Puran Chand, deceased, defendants.

In his plaint Babu Dwarka Das alleged that, by a registered sale-deed made by Puran Chand on the 22nd of March 1882, Puran Chand had sold the house and bungalow in question to him for the price of Rs. 7,500 and that he, the plaintiff, having paid the entire purchase money, got proprietary possession of the house and bungalow and still held the house and the bungalow as his property. He stated the fact that Babu Kameshar Prasad had obtained the decree under which the property was attached, the fact of the attachment, of his objection and of the disallowance of his objection, and prayed that :—

“(1) It may be declared by the Court that by virtue of the aforesaid purchase the plaintiff is the owner and in possession of the brick and stone-built house consisting of four sections, and the bungalow built after English fashion, both the land and the building, situate in mohalla Nilkanth Mahadeo in the city of Benares, bounded as below, and that the property is not attachable or saleable in execution of the said decree. Value of suit Rs. 7,500.

“(2) The costs of the suit may be charged against the defendants with future interest.”

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The plaintiff sought two substantial declarations within the ruling in *Moti Singh v. Kaunsilla* (1), the latter of which, on the facts alleged in the plaint, necessarily involved the former, although the former did not necessarily involve the latter.

The defendant, Musammat Sahudra Bibi, did not defend the suit. The other defendant, Babu Kameshar Prasad, filed a written statement and defended the suit. In the written statement he alleged, amongst other things, that the whole proceedings "connected with the sale-deed in question, dated the 22nd of March 1882, are fictitious. The sale-deed in question was not intended to transfer any property, nor was any property transferred by it to the plaintiff. It was executed and completed without any consideration with a view to protect the property of the deceased debtor Puran Chand *alias* Raja."

In support of the contention that this appeal lay to the Court of the District Judge—Mr. *Madho Prasad* for the plaintiff appellant relied upon *Gulzari Lal v. Jadaun Rai*, (2) *Durga Prasad v. Rackla Kuar* (3), *Krishnama Chariar v. Srinivasa Ayyangar* (4), *Modhusudun Koer v. Rakhal Chunder Roy* (5) and *Daya Chand Nem Chand v. Hem Chand Dharam Chand* (6).

Mr. *Jogindro Nath Chaudhri*, for the defendant respondent, Babu Kameshar Prasad, in support of the contention that the appeal lay to this Court relied upon *Mahabir Singh v. Behari Lal* (7) and *Madho Das v. Ramji Patak* (8).

It appears to us that the decision in *Daya Chand Nem Chand v. Hem Chand Dharam Chand* (6) has little or no bearing on the question which we have to decide.

In *Gulzari Lal v. Jadaun Rai* (2) (the decision in which was explained in the case to which we shall next refer), *Durga Prasad v. Rackla Kuar* (3), *Krishnama Chariar v. Srinivasa Ayyangar* (4) and *Modhusudun Koer v. Rakhal Chunder Roy* (5) the suits, so far as we can gather from the reports, were either solely between

(1) I. L. R., 16 All., 308.

(2) I. L. R., 2 All., 799.

(3) I. L. R., 9 All., 140.

(4) I. L. R., 4 Mad., 339.

(5) I. L. R., 15 Cal., 104.

(6) I. L. R., 4 Bom., 515.

(7) I. L. R., 13 All., 320.

(8) I. L. R., 16 All., 286.

the execution-creditor and the claimant-objector on one side or the other, or, if the judgment-debtor was a party as defendant, the effect upon his title and that of all claiming through him of a decision in the suit that the property was not liable to the attachment of the execution-creditor was not raised or considered.

It appears to us that when the only parties to a suit under s. 283 of Act No. XIV of 1882 are the execution-creditor or his representative on one side, as plaintiff or as defendant, and the claimant-objector or his representative on the other, and the sole question in the suit between such parties is the question whether the property attached in execution of the decree of the execution-creditor is or is not liable to be attached and sold in execution of the decree of the execution-creditor, the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887, which, by cl. (13) of s. 3 of Act No. I of 1887, means "the amount or value of the subject matter of the suit," is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property, and the value of so much of the property sought to be sold as will on a sale satisfy the amount sought to be realized by the sale, when the value of the property attached exceeds the amount sought to be realized, and that in such latter case the amount which it is sought to realise by a sale under the decree may be taken as the value of that portion of the property the sale of which will theoretically, although possibly not in practice, be sufficient to satisfy the amount sought to be realised by a sale. To that extent we are of opinion that the rule deducible from the cases reported in I. L. R., 2 All. 799, I. L. R., 9 All. 140, I. L. R., 4 Mad. 339 and I. L. R., 15 Calc. 104 is correct, when the array of parties is confined to the execution-creditor or his representative on one side and the claimant-objector or his representative on the other, and the sole question to be decided is whether the property is liable to attachment and sale in execution of the decree of the execution-creditor.

In our opinion different considerations arise, which must be considered and given effect to, when in a suit under s. 283 of Act

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No. XIV of 1882 the judgment-debtor or his representative is made a party as a defendant to the suit, and it is necessary to decide the question of jurisdiction as to the Court in which the suit or an appeal in the suit may be brought.

In a suit under s. 253 of the Act No. XIV of 1882 in which the claimant-objector is the plaintiff and the execution-creditor is the defendant, and in which the judgment-debtor is not party as a defendant, the questions as to the title of the judgment-debtor which it may be necessary to decide are decided solely between the parties to the suit, and a decision of or involving those questions of title would not operate as *res judicata* under s. 13 of Act No. XIV of 1882, should the same title be in issue in any subsequent suit between either of the persons who was a party to the suit under s. 253 and the person who was the judgment-debtor in the proceedings to which the suit under s. 253 related, or those who claimed title through them respectively.

On the other hand, when the claimant-objector makes the judgment-debtor a defendant to his suit under s. 253, and does not limit his claim, he claims both in form and substance against the judgment-debtor a declaration of his title to the whole of the property the title to which is in issue in the suit. A decree in such a suit declaring that the property is liable or is not liable to attachment and sale in execution of the execution-creditor's decree must necessarily, unless the suit be decided on a ground which did not involve the decision of a question of title, decide and determine all questions of title upon which in that suit the plaintiff on the one side and the judgment-debtor on the other could then rely, and such decision would operate in any future suit between these two parties or those who claim title through them as *res judicata* under s. 13 of Act No. XIV of 1882 on those questions of title, although such subsequent suit might relate to property not in question in the suit under s. 253, provided that the Court in which the suit under s. 253 was instituted and decided was a Court of jurisdiction competent to try the subsequent suit. The present suit will illustrate our meaning. The plaintiff claims a declaration that the house and

bungalow in question are not liable to attachment and sale in execution of Babu Kameshar Prasad's decree. The other declaration which is claimed by the plaintiff, namely, that the house and bungalow became vested in him by the alleged sale-deed of the 2nd of March 1882, is necessarily involved in the declaration that the house and bungalow are not liable to be attached and sold, as it appears that upon that sale-deed of the 2nd of March 1882 the plaintiff relies for his title and the right to a declaration that the property is not liable to attachment and sale in execution of Babu Kameshar Prasad's decree. A decree that the property was not liable to such attachment and sale would necessarily involve, there being no question of estoppel or limitation, the decision, on the question of title, that the sale-deed was a fictitious instrument under which no title passed from Puran Chand to the plaintiff, or that it was a genuine sale-deed effecting a genuine and unimpeachable transaction of sale, and by which title passed from Puran Chand to the plaintiff. The representative of the deceased Puran Chand being a defendant to this suit, and having regard to the jurisdiction of the Court in which the suit has been brought, a decree declaring that the property was not liable to attachment and sale in execution of Babu Kameshar Prasad's decree would, in any subsequent suit between the present plaintiff or anyone claiming through him on the one side and Musammat Sahudra Bibi or anyone claiming through her on her title derived from Puran Chand on the other, preclude Musammat Sahudra Bibi and all those claiming through her or her title as the representative of Puran Chand from disputing the validity and effect in passing title of the sale-deed; but it is to be observed that the plaintiff might be entitled to such a declaration as against Musammat Sahudra Bibi, although facts might possibly be proved which would estop the plaintiff from alleging as against Babu Kameshar Prasad that the property attached was not liable to attachment and sale in execution of Babu Kameshar Prasad's decree.

We are consequently of opinion that when in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative a party as defendant to the

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suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit within the meaning of s. 19 and s. 21 of Act No. XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of the property in execution of the decree.

The opinions which we have above expressed in no way conflict with the decisions in *Mah. bi Singh, v. Beha. i Lal*, (1) and *Madho D s v. R mji Potak* (2). We have indicated what, in our opinion, is, for the purposes of jurisdiction, the value of a suit under sec. 283 of Act No. XIV of 1882, when the judgment-debtor or his representative is made, and when he is not made, a party to the suit as a defendant. In either case the value of the suit for the purpose of jurisdiction is the value stated by the plaintiff in his plaint, provided that such value is not understated or overstated with the object of getting the suit admitted in a Court in which, by reason of the true value of the suit and s. 15 of Act No. XIV of 1882, the suit does not lie. In the present case, assuming, and it is not disputed, that Rs. 7,500 is the value of the property, this appeal lay to this Court and not to the Court of the District Judge.

At the conclusion of the arguments on the question of jurisdiction we asked Mr. *Madho Prasad*, to support his client's appeal on the merits, and he admitted that he could not do so. Under the circumstances it is not necessary for us to express any opinion as to whether or not the plaint disclosed any cause of action against Musammat Sihudra Bibi. We presume that the object of Mr. *Madho Prasad* in raising the question of jurisdiction and asking us to return the memorandum of appeal to his client was to avoid the appeal being dismissed with costs; and to enable his client to escape paying the costs of an appeal which could not be supported. It may be assumed, as the appeal cannot be supported on the merits, that the memorandum of appeal, if returned by this Court, would not be again presented to the Court of the District Judge.

We dismiss the appeal with costs.

Appeal dismissed.

(1) I. L. R., 13 All. 320,

(2) I. L. R., 16 All. 286.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

AMANAT-UN-NISSA AND ANOTHER (PLAINTIFFS) v. BASHIR-UN-NISSA AND ANOTHER (DEFENDANTS).*

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December 12.

Muhammadan law—Widow—Dower—Lien of widow for dower—Such lien not acquired by widow taking possession against the consent of the other heirs.

If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled.

Musummat Bebee Bachun v. Sheikh Hamid Hossein (1), Musummat Wahid-un-nissa v. Musummat Shabrattun (2), Syud Bazayet Hossein v. Dooli Chund (3), Musummat Meerum v. Musummat Nojeebun (4), Ali Muhammad Khan v. Aziz-ullah Khan (5) and Bibi Mehrun v. Musummat Kubeerun (6) referred to. Woomatool Fatima Begum v. Meerunmun-nissa Khanum (7), Ahmed Hossein v. Musummat Khodja (8) and Balund Khan v. Musummat Janee (9) distinguished.

The facts of this case are as follows :—

The plaintiffs, Musammat Amanat-un-nissa and Musammat Mariam-un-nissa, respectively the mother and sister of a deceased Muhammadan, one Shaikh Khadim Husain, sued the two widows of the deceased Khadim Husain, Musammat Bashir-un-nissa and Musammat Khudayat-un-nissa for a declaration of their title, as heirs of the deceased, to 28 out of 72 sihams of the property left by him and for recovery of certain property, both movable and immovable, of which they alleged the widows to be in possession. The plaintiffs alleged that the defendants had taken possession of all except a small portion, specified in the plaint, of the property of the deceased shortly after his death, against the consent of the other heirs, and had got their names entered in the Revenue papers in respect of the immovable property. They offered, in case the defendants set up a claim that they were in possession of the property claimed from

*First Appeal No. 312 of 1893, from a decree of Shah Ahmad-ullah, Subordinate Judge of Saharanpur, dated the 8th September 1893.

(1) 14 Moo. I. A., 377; at p. 384.

(2) 6 B. L. R., 54.

(3) L. R., 5 I. A., 211.

(4) N.W. P., H. C. Rep., 1867, p. 385.

(5) I. L. R., 6 All., 50.

(6) 13 W. R., C. R., 49.

(7) 9 W. R., C. R., 318.

(8) 10 W. R., C. R., 369.

(9) N.W. P., H. C. Rep., 1870, p. 819.

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them in lieu of their respective dower debts, without admitting the defendants' right, to pay such proportion of the dower debts as might be found due in respect of the sihams claimed by them.

The defendant Bashir-un-nissa, after filing a defence, subsequently admitted the plaintiffs' claim.

The defendant Khudayat-un nissa put forward the following pleas in defence to the suit:—That the suit was bad for misjoinder; that without a prayer for settlement of the amount of dower due to her the suit was invalid; that the claim for possession of entire houses without excluding her share was wrong; that the movable property claimed was not in her possession, and that the clothes had been given in charity with the permission of the plaintiffs; that the defendant was in possession of the immovable property in lieu of Rs. 11,600, her dower debt; that she had spent Rs. 606-11-0 in the Fatiba ceremonies of Khadim Husain; that Rs. 502-14-0 were due to her by Khadim Husain on account of her salary, and that unless all this money were paid off, the suit for the estate of Khadim Husain could not be maintained.

The Court of first instance (Subordinate Judge of Saharanpur) on the second issue framed by it, *viz* :—"What is the amount of the dower of Musammat Khudaya, is she in possession of the immovable property left by Khadim Husain in lieu of that dower, and can under such circumstances a suit be brought to enforce inheritance?"—found as follows:—"On the second issue it is admitted by the plaintiffs that Musammat Khudaya is a wife of Khadim Husain, deceased, and it is further admitted that Rs. 1,000 on account of her dower is still unpaid, though she has stated the amount of her dower to be Rs. 11,000. It is also admitted that the defendant has been in possession of the property left by her husband Khadim Husain ever since the day of his death. As the defendant says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such a case it must be admitted that, so long as her dower-debt is not paid, inheritance

cannot be enforced, nor can the plaintiffs get possession of their respective shares.

"It is suggested in the plaint that, if anything be proved to be due to the defendant, a conditional decree contingent on payment of the same may be passed in favor of the plaintiffs. As to this I say that the suit as it stands has not been instituted in a proper form; that is, it has not been stated what the amount of the defendant's dower is, what is due to her according to account, and what amount of dower-debt the plaintiffs are willing to pay, but the plaintiffs have brought a suit for possession of their share in the ordinary manner. Under such circumstances a conditional decree on payment of the dower-debt cannot be passed."

The Court accordingly passed a decree dismissing the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and Maulvi *Ghulam Muftaba*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

EDGE, C. J. and BANERJI, J.—This appeal has arisen in a suit brought by two of the heirs of a deceased Muhammadan of the Sunni sect against two of the widows of the deceased to obtain possession of their share of the inheritance which came to them on the death of the deceased Muhammadan. In their plaint the plaintiffs expressed their willingness to pay a proportionate part of any dower-debt which might be found to exist in favor of the defendants. One of the defendants confessed judgment. The parties to the suit admitted that the dower-debt amounted to Rs. 1,000, in favor of Musammat Khudayat-un-nissa, but the Subordinate Judge dismissed the suit on the ground that "as the defendant (Musammat Khudayat-un-nissa) says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such case it must be admitted that so long as her dower-debt is not paid inheritance cannot be enforced, nor can the plaintiffs get possession of their respective shares." From that decree of dismissal this appeal has been brought.

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The Subordinate Judge with all his experience should have known better than to have stated in a judgment that he acted upon the statement of one of the parties as to a fact not admitted by the other side and not found on evidence to be true. As to whether Musammat Khudayat-un-nissa was in possession in lieu of her dower, that is, whether she was in the enjoyment of a lien for her dower, there is no evidence to show that either by contrast with her deceased husband, or by any act of his or of the other heirs, or with their consent, she was put in possession of the property with the object of her having a lien on it for her dower. On her behalf some proceedings in a Court of Revenue were relied on as showing that she had an actually vested lien on the property for her dower. In those proceedings the Court of Revenue, adverse to the heirs, put Musammat Khudayat-un-nissa in possession in lieu of her dower. The Court of Revenue had no power or jurisdiction to put this lady or anyone else in possession in lieu of dower, or to adjudicate on the question of her alleged right of lien. So far as the question before us is concerned the order of the Court of Revenue is not only not decisive, but is beside the question which we have to decide.

What, according to the judgment of the Subordinate Judge, admittedly took place was this, the lady was not in possession at the time of her husband's death, but immediately on his death seized his property in order to have a lien for her dower. We cannot regard her possession as having been lawfully obtained within the meaning of the judgment of their Lordships of the Privy Council in case of *Mussumat Behee Bakhun v. Sheikh II. and Hossein* (1). So far as we are aware neither a Muhammadan widow nor any other creditors can give themselves a lien by taking possession, without the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs,

(1) 12 Mon. J. A., 377 at p. 384.

on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien. In such case the Muhammadan widow on taking possession would obtain a lien for her dower. Of course, whether she obtains a lien or not, she can, if her claim is not barred by limitation, obtain contribution from the heirs in satisfaction of such part of her dower as is not proportionately represented by the share of the inheritance which comes to herself.

We are led to the above conclusion from the inference to be drawn from the case of *Musummat Wahid-un-nissa v. Musummat Shahratan* (1) and the approval of that decision by their Lordships of the Privy Council in the case of *Synd Bazayet Hossain v. Dooli Chund* (2). The view we have taken is supported by the decision of this Court in *Mussumat Meerun v. Mussumat Najeebun* (3) and in *Ali Muhammad Khan v. Aziz-ullah Khan* (4) and also by the decision in *Bibi Mehrun v. Mussumat Kubeerun* (5). We hold in this case that Musammât Khudayat-un-nissa has failed to prove that she had any lawful lien on the property left by her deceased husband. We were referred by Mr. *Abdul Raouf*, who appeared for the respondent, to the cases of *Woomatool F. tima Be-rum v. Meerun-un-nissa Khannum* (6) and of *Ahmed Hossein v. Mussumat Khodeja* (7); and *Baland Khan v. Mussumat Janee* (8) but it does not appear in those cases that the widow had taken possession without the consent or authority of the persons interested.

We set aside the decree of the Court below, and, the case having been decided on this preliminary point, we remand it under s. 562 of the Code of Civil Procedure to be decided on its merits.

Costs here and hitherto will abide the result.

Cause remanded.

(1) 6 B. L. R., 54.

(2) L. R., 5 I. A., 211.

(3) N.-W. P., H. C. Rep., 1867, p. 335.

(4) I. L. R., 6 All., 50.

(5) 13 W. R., C. R., 49.

(6) 9 W. R., C. R., 318.

(7) 10 W. R., C. R., 369.

(8) N.-W. P., H. C. Rep., 1870, p. 319.

1894

AMANAT-UN-
NISSA
v.
BASHIR UN-
NISSA.

1894
December 22.

Before Mr. Justice Knox and Mr. Justice Banerji.

CHEDI LAL AND OTHERS (DEFENDANTS) v. KUARJI DICHIT (PLAINTIFF).
Execution of decree—Civil Procedure Code, ss. 483, 484, 486—Attachment of money deposited in Court.

The term "property" as used in ss. 483 and 484 of the Code of Civil Procedure is wide enough to include property of every description, movable and immovable, whether in the actual possession of the defendant or of some other person on his behalf; and the words "the Court may require him . . . to produce and place at the disposal of the Court" only refer to such property as is capable of being produced in Court.

Where property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up.

This was an appeal against an order of remand in a suit for the recovery of a sum of money which had been paid into the Court of the Subordinate Judge of Benares under the following circumstances:—

Five out of the seven defendants to the suit held a decree against the second defendant, Sheomangal Singh, and in execution of it attached certain money which had been paid in favor of defendant No. 2 in a redemption of mortgage case at Mirzapur; the money in consequence of that attachment was transferred to the Subordinate Judge's Court at Benares.

While this money was in deposit, the plaintiff brought a suit against Jaimangal Singh (afterwards deceased) and defendants Nos. 1 and 2 (Harmangal and Sheomangal) and on the 8th of August 1888 applied for attachment before judgment of this money on the ground that it belonged to all three men. The Subordinate Judge's Court on the 5th of August 1888 passed an order attaching the money before judgment and ordering the then defendants to file security within twenty-four hours and to show cause by the 22nd of August why the attachment should not be maintained.

No notice was issued under this order, and on the 22nd of August the plaintiff got a decree against the defendants Nos. 1 and 2 and Jaimangal.

First Appeal No. 89 of 1894, from an order of R. H. Macleod, Esq., District Judge of Benares, dated the 5th January 1894.

On the 23rd of August he applied for execution against certain property, including the deposit the subject of the present suit, which he described as already under attachment.

This application was, on the 1st of September 1888, rejected by the Subordinate Judge on the ground that "as the money attached was realized in execution of decree of Chedu Sahu and others before the application of Kuarji Dichit, the latter is not entitled to any portion of it."

The plaintiff accordingly filed a regular suit to recover the money deposited as above described.

This suit was dismissed by the Subordinate Judge on the ground that the order for attachment of the 8th of August 1888 was never perfected, and consequently that the plaintiff, not being an attaching creditor, had no right of suit.

The plaintiff appealed to the District Judge, who reversed the finding of the lower Court as to the validity of the attachment of the 8th of August 1888 and remanded the case for disposal on the merits under s. 562 of Act No. XIV of 1882.

From this order of remand the defendants Nos. 3, 4, 5 and 6 appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Munshi *Jwala Prasad*, for the respondent.

KNOX and BANERJI, J J.—The appellants held a decree against one Sheomangal Singh, and in execution of it obtained an order from the Court of the Subordinate Judge of Benares for the attachment of some money which was deposited in the Court of the Subordinate Judge of Mirzapur. The amount so attached was transmitted to the Court of the Subordinate Judge of Benares and was deposited in that Court on the 31st of July 1888.

The respondent brought a suit in the Court of the Subordinate Judge of Benares against Sheomangal Singh and two other persons, and applied for attachment before judgment of the amount referred to above as the property of his defendants. On the 8th of August 1888, the Court made an order for attachment under the

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second paragraph of s. 484 of the Code of Civil Procedure. The respondent obtained a decree on the 22nd of August 1888, and applied for payment of the money, for the attachment of which he had obtained an order on the 8th August 1888. His application was refused, and thereupon he brought the present suit claiming two-thirds of the money as the property of his debtors other than Sheomangal Singh.

The Court of first instance dismissed the suit on the ground that the order of attachment made on the 8th of August 1888 was not carried into effect and that there was no valid attachment of the money claimed by the respondent. The lower appellate Court has set aside the decree of the Subordinate Judge and remanded the case for trial on the merits. It is from this order of remand that this appeal has been brought.

We must observe that we are unable to accede to the contention of Mr. *Jwala Prasad* for the respondent, that the respondent was competent to maintain this suit even if there was no attachment of the money claimed by him. That money belonged, according to the allegation of the respondent, to his debtors, and he had no right to claim any portion of it, unless by reason of an attachment made before or after judgment he acquired a title to receive it. It must therefore be determined whether there was a valid attachment on the amount claimed by the respondent on the date on which he instituted his suit.

It is clear that on the 8th of August 1888 the Court made an order for the conditional attachment of the money in question under the last paragraph of s. 484 of the Code of Civil Procedure. Mr. *Sundar Lal*, on behalf of the appellants, has argued that there was no valid attachment for three reasons. He first contended that ss. 483 and 484 contemplated only the attachment of movable property in the possession of the defendant, and not of property which is not in his possession, and he relied in support of his argument on the provisions of s. 484, which directs that the notice issued to the defendant under that section may require him to "produce and place at the disposal of the Court" the property sought to be attached.

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We are of opinion that the word "property" as used in ss. 483 and 484 is wide enough to include property of every description, movable and immovable, whether in the actual possession of the defendant or in the possession of some other person on his behalf, and that the words in s. 484 relied upon by Mr. *Sundar Lal*, refer only to such property as is capable of being produced in Court.

Mr. *Sundar Lal* next contended that no notice to show cause as required by s. 484 was issued and therefore there was no valid attachment. The answer to this contention is that the conditional attachment referred to in the last paragraph of that section must precede the issue of a notice to show cause, and therefore the omission to issue the notice cannot invalidate the order for conditional attachment.

The third and main ground urged by Mr. *Sundar Lal* was that no attachment, conditional or otherwise, was made by the Court in the manner required by law. Section 272 of the Code of Civil Procedure, which, by reason of the provisions of s. 486, applies to the attachment of property deposited in a Court, directs that the attachment shall be made by a notice to such Court requesting that such property may be held subject to the further order of the Court which ordered the attachment. In our opinion where the property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court and it is not necessary that a separate formal notice should be drawn up. It is no doubt desirable that in all cases a formal notice should be drawn up and placed on the file of the case to which the deposit relates, but we are of opinion that the absence of such a notice, where the property attached is deposited in the Court which ordered the attachment, does not vitiate the attachment. In this case an order for conditional attachment under the last paragraph of s. 484 was recorded by the Court. This was, in our opinion, sufficient to create a valid attachment on the money deposited in that Court, and we agree with the learned Judge below in holding that the respondent had a right of suit. We dismiss this appeal with costs.

Appeal dismissed.

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January 11.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* TEJA AND OTHERS.

Act No. XLV of 1860 (Indian Penal Code) s. 396.—Dacoity in the course of which murder is committed—Facts necessary to establish the offence provided for in s. 396.

When in the commission of a dacoity a murder is committed it matters not whether the particular dacoit charged under s. 396 of Act No. XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. *Queen-Empress v. Umrao Singh* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Neither the appellants nor the Crown were represented.

EDGE, C. J. and BANERJI, J.—Teja and Zaharia have appealed against sentences of death passed upon them for the offence of dacoity with murder, under s. 396 of the Indian Penal Code. It is clearly proved that on the 29th of April 1892, a dacoity was committed at the village of Hath Kant, in the commission of which dacoity a villager named Janki Prasad was shot dead by one of the dacoits. There is evidence showing that the person who fired the shot was Zaharia. Janki Prasad and the dacoits who actually killed him were outside the house. At the time Teja was inside the house, plundering it. The evidence leaves no doubt that these two men were members of the gang of dacoits engaged actually in that dacoity. As to Zaharia there can be no question that he has brought himself within s. 396 of the Indian Penal Code. But as to Teja it is necessary to consider whether the fact that the murder was committed outside the house at a time when he was inside the house takes his case out of s. 396. In the case of *Queen-Empress v. Umrao Singh*, (1) a Bench of this Court said in its judgment:—"We are also of opinion that to establish a liability to the punishment provided in this section (s. 396) it is necessary to prove that the person said to be liable was one of the persons

(1) L. L. R. 16 All. 437.

who were conjointly committing dacoity, and was present when the act of murder in the dacoity was committed." Further on it was said :—"There is room for such doubt, particularly in the case of Girwar Singh and Raghubar Singh, for there is no evidence which places them within the house of Hira Lal at the time when the murder was committed."

If those two statements to which we have referred are to be taken as of general application, we entirely dissent from their correctness as statements of law. It is probable that in that particular case in which that judgment was delivered Girwar Singh and Raghubar Singh were not proved to have been conjointly with the others committing dacoity. However, on that we need express no opinion. In our opinion it matters not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under s. 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. In our opinion these two men were properly convicted of the offence punishable under s. 396 of the Indian Penal Code. We dismiss their appeals, and, confirming the convictions and sentences, we direct that those sentences be carried into effect.

APPELLATE CIVIL.

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EMPRESS
v.
TEJA

1895.

January 10.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

KUAR SEN (PLAINTIFF) v. MAMMAN AND OTHERS (DEFENDANTS).*

Easement—Customary right—Facts necessary to establish the existence of a customary right.

The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kothi*, and for demolition of a chabutra thereon. The defendants denied the plaintiff's title and alleged that they always used the chabutra as a sitting place, and that during the *Moharram* the *taxis* and *alums* were exhibited upon the chabutra and a *takht* was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the

* Letters Patent Appeal No. 1 of 1894.

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Moharram. The lower appellate Court on the question of the defendants' right to use the said land in the manner claimed by them found as follows:—"That various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* upon the land and sung there." *Held* that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired.

Where a local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Aikman, J. in S. A. No. 388 of 1893, reported in the I. L. R., 16 All. 178. *q.v.* The facts of the case are fully stated in the judgment of the Court.

Mr. D. N. Banerji and Babu Jogindro Nath Chaudhri, for the appellant.

Mr. Amir-ud-din for the respondents.

EDGE, C.J. and BANERJI, J.—The plaintiff, who is the appellant in this appeal under s. 10 of the Letters Patent, brought his suit for the possession of a piece of land, which, he alleged, formed part of the court-yard of his *kothi*, and for the demolition of a chabutra thereon, which the defendants claimed the right to maintain and use. The defendants in their written statement denied the plaintiff's title, and alleged that they always used the chabutra as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the chabutra and a *takht* was placed upon it. At the trial in the Court of the Munsif it was orally pleaded on behalf of the defendants that they had obtained a title to the land and chabutra by adverse possession.

The Munsif found that the land in question was the plaintiff's and was part of the court-yard of his *kothi* and that the defendants had not acquired any title to it by adverse possession. This is what

the Munsif said on the question of adverse possession in his judgment:—

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“I am inclined to think that the defendants and other *mirasis* of the locality have been laying their *tazias* on this land during the *Moharram*. This is the only right which the defendants have acquired by long and uninterrupted usage. I cannot go so far as to hold that such possession amounts to adverse possession.” Further on in the judgment the Munsif, after discussing some decisions, found as follows:—“I therefore hold that the defendants, by virtue of an old custom, have acquired right to lay their *tazias* on this spot during the *Moharram* only and perform the ceremonies incidental to it,” and he gave the plaintiff a decree for possession of the land and for demolition of the chabutra, but reserved to the defendants a right to erect, two days prior to each *Moharram*, a temporary chabutra on the piece of land and to use such chabutra by laying upon it their *tazias* and performing upon it the incidental ceremonies from the 1st to the 12th days inclusive of the *Moharram* in each year. From that decree the plaintiff appealed, as did also the defendants, to the Court of the District Judge of Bareilly. The learned District Judge found that the land in question was the plaintiff's and that the defendants had acquired no right by prescription to use the land or the chabutra and that no custom to use the land or chabutra had been established. After stating his reasons, with which we agree, for holding that the defendants had acquired no easement by prescription, he thus discussed the question of a custom:—

“Have the defendants and other *mirasis* a customary right to use the land for stationing their *tazias* and *alums* at the time of the *Moharram*? Assuming that such rights might possibly be acquired against proprietors of land by a class only out of the public, I think proof is requisite that the use has been of right and had not a merely permissive origin, and that the right should be distinctly claimed as by custom. Now in the present case, beyond the mere fact that various *mirasis*, whose connexion with each other is not established, have, within a period of twenty years or so, placed *tazias* on the land and sung there, I find no evidence of a right.

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The particular part of Bareilly does not seem to have been long inhabited, and the only clue to the origin of the use is a suggestion by Chaudhri Shib Lal, witness for the defendants, that his ancestor may have permitted it when he was zamindár. But besides this, the defendants do not set up a claim to customary user, but pleaded a proprietary right which they have failed to establish." The District Judge allowed the plaintiff's appeal, and varied the decree of the Munsif by directing that the chabutra be removed without permission to the defendants to re-build temporarily.

From the decree of the District Judge the defendants appealed to this Court. The appeal was heard by our brother Aikman. He was of opinion that the defendants had in their written statement claimed a customary right to use the land and chabutra for the ceremonies of the *Moharram*. Our brother Aikman in his judgment said :—"There was evidence in this case that the *mirasis*, to which caste the defendants-appellants belong, had for a period of twenty years or so placed *tazias* on the disputed plot and sung there. There was a suggestion that this was by leave of the zamindár, but there was no evidence in support of this. In my opinion the facts found by the District Judge are sufficient to establish the custom set up by the appellants," and he restored the decree of the Munsif. From that decree of our brother Aikman this appeal has been brought by the plaintiff.

It is obvious from the findings of the District Judge that no easement by prescription had been proved in this case. There was no dominant tenement. It was not proved that the defendants or any of them had as of right and without interruption and for twenty years enjoyed a right to use the land or the chabutra for any purpose whatsoever. All that was proved, according to the findings of the District Judge, was "that various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* on the land and sung there." We are bound by the findings of fact of the lower appellate Court, but we are not bound by the conclusions of law of the lower appellate Court. What we have to consider is, does the fact which the District Judge

found—that various *mirasis* whose connexion with each other was not proved, had “within a period of twenty years or so placed *tazias* on the land and sung there,”—unexplained, necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired?

If that fact found by the District Judge and unexplained does not necessarily in law lead to that conclusion, the decree of the District Judge was by reason of ss. 584 and 585 of the Code of Civil Procedure final and non-appealable.

Section 18 of the Indian Easements Act, 1882 (Act No. V of 1882) leaves at large the question of law how a local custom may be established. As such a local custom as is now set up on behalf of the defendants excludes or limits the operation of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them.

A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has by agreement or otherwise become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would other-

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wise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time. We cannot in these Provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And in our opinion it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period.

In our opinion a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned.

As we understand the judgment of the District Judge, all which he found to have been proved by the evidence was that different *mirasis* had within a period of about twenty years before suit placed, during the *Moharram*, *tazias* upon the land and had sung there, but that it was not proved, at any rate to his satisfaction, that there was any connexion between such different *mirasis*, or that they represented the body of *mirasis* of Bareilly, or even of the particular mohalla or part of Bareilly in which the plaintiff's land is situate. We cannot say that in law the District Judge was bound, on the evidence before him in first appeal, to hold that a local custom under which the defendants could lawfully and adversely to the plaintiff

go upon his land or maintain or erect a chabutra there was established. Under such circumstances we allow this appeal with costs, and, setting aside the decree of this Court, we restore and affirm the decree of the District Judge.

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Appeal decreed.

Before Sir John Edge, Kt, Chief Justice and Mr. Justice Banerji.

MUHAMMAD KARIM-ULLAH KHAN (PLAINTIFF*) v. AMANI BEGAM AND OTHERS (DEFENDANTS).

Muhammalan law—Dower—Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.

When a Muhammadan widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Burkitt, J., in S. A. No. 940 of 1893, reported in I. L. R., 16 All. at p. 225. The facts of the case were as follows:—

The plaintiff sued as heir to one Mahmud Khan for partition of certain immovable property alleged to have been of Mahmud Khan in his life-time. He impleaded as defendants Musammat Amani Begam and Musammat Moti Begam the two widows of Mahmud Khan, Musammat Mahbub Begam the widow of one Umar Khan deceased, brother to Mahmud Khan, and certain other persons who, he stated, with himself comprised the entire list of the heirs of Mahmud Khan. He claimed possession by partition of 21 sihams out of 128 sihams in two houses specified in the plaint, of which the widows were apparently in possession, but he did not offer to pay any portion of any dower-debt which might be due to the widows or any of them, nor did he mention that any such dower-debt was due.

* Letters Patent Appeal No. 23 of 1894.

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Amani Begam, the principal defendant, pleaded *inter alia* that the property claimed was in possession partly of herself, partly of Mahbub Begam and partly of one Husaini Begam, the widow of a brother of Mahmud Khan (who, she alleged, was a necessary party to the suit, which was therefore bad for misjoinder); the possession of herself and of Mahbub Begam being in lieu of the respective dower-debts due to them. She also pleaded that the suit was a collusive suit brought at the instance of one of the defendants, who had purchased the rights of some of the other defendants as a speculation, and further denied the plaintiff's title as an heir to Mahmud Khan.

The defendant Mahbub Begam also pleaded possession in lieu of her dower-debt and denied that the plaintiff or the defendants Nos. 4, 5 and 6 had any title by inheritance. Those defendants admitted the plaintiff's claim and prayed to be exempted from costs. The defendants Moti Begam and Abdul Rahman (the alleged vendee of a portion of the property in suit) entered no appearance.

The Court of first instance (Munsif of Sambhal) found that the pedigree given by the plaintiff was correct; that Husaini Begam was not a necessary party to the suit; that the three principal defendants were in possession in lieu of their respective dower-debts, and that the plaintiff was not entitled to succeed on the plaint as framed. It accordingly dismissed the plaintiff's suit.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Moradabad) made an order of remand for decision of the issue.—“Did the widows of Mahmud Khan get possession of his estate in lieu of their dower with the consent express or implied of his heirs?”

This order of remand was set aside on appeal by the High Court, and the appeal to the lower appellate Court again came on for hearing, when the Court recorded the following finding:—“From the evidence on the record it is not conclusively proved that the defendant (*i.e.* the principal defendant Amani Begam) came into possession in lieu of dower-debt with the permission and consent of th-

heirs of the husband. It is also worthy of consideration that the defendant (female) did not even consider the plaintiff as heir of her husband. Then there was no reason why she would have obtained his consent. The genealogical table filed by the plaintiff is proved to be correct, and it is also proved satisfactorily that the plaintiff is heir of Mahmud Khan. The sibams (shares) alleged by the plaintiff are correct according to Muhammadan law." The lower appellate Court then proceeded to decree the plaintiff's appeal.

The defendants Amani Begam and others thereupon appealed to the High Court, and the appeal coming on for hearing before Burkitt, J., was decreed and the decree of the Court of first instance restored on the 15th of February 1894.

The plaintiff then appealed under s. 10 of the Letters Patent.

Munshi *Madho Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

EDGE, C. J. and BANERJI, J.—This appeal has arisen out of a suit brought for possession by partition by one of the heirs of a deceased Muhammadan. The property in dispute was a house in which the Muhammadan had lived. Two of the defendants-respondents were widows of the deceased Muhammadan, and after his death they continued to live in the house in undisputed possession for more than a year. They resisted the suit on the ground that they were in possession for their dower. It is found that dower in fact was due. The case came before our brother Burkitt on appeal on behalf of the defendants. He allowed the appeal and dismissed the plaintiff's suit. This appeal has been brought by the plaintiff. What the Subordinate Judge found in first appeal with regard to possession for dower was this—"From the evidence on record it is not conclusively proved that the defendants came into possession in lieu of dower with the permission and consent of the heirs." It appears to us that when a Muhammadan widow is in possession and has been for some time in undisturbed possession, and dower is admitted or proved to be due to her, it lies

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upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower, or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. The Subordinate Judge put the *onus* upon the wrong party in our opinion. We adhere to our judgment delivered in *Amanat-un-nissa v. Bashir-un-nissa*. (F. A. No. 312 of 1893, decided on the 12th of December 1884. *Supra* p. 76) on the question as to whether a Muhammadan widow who is proved not to have obtained possession in lieu of dower either from her husband or with the consent or acquiescence of the heirs, has or has not a lien over the property. It appears to us that that judgment does not touch the present case. We have been again referred to a judgment of their Lordships of the Privy Council in *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (1), and it has been contended that it appears, as was assumed by our brother Burdett in the present case, that in that case the Muhammadan widow had obtained possession in lieu of her dower after her husband's death. In our opinion that fact does not appear from the report. In 1851 the Muhammadan widow in that case instituted proceedings before the Collector to obtain mutation of names in her favor, her husband having died in the previous month. It is stated in the report—“She alleged in her petition that she was in possession by right of inheritance and also on account of her dower.” It was argued from the passage that it necessarily follows that she claimed to have obtained possession in lieu of her dower after her husband's death. That does not follow in our judgment. If she had been put in possession by her husband in his life-time in lieu of dower she would probably describe her possession after his death as a possession by right of inheritance and also on account of dower. In this case, it not having been found as a fact that these ladies had not obtained possession in lieu of dower with the consent or by the acquiescence of the heirs, the plaintiff failed to prove the right to partition without the payment of his proportionate share of dower.

(1) 14 Moo. I. A. 377.

Although we do not agree with the propositions of law of our brother Burkitt, we, for the above reasons, dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

GENDA MAL AND ANOTHER (DEFENDANTS) v. PIRBHU LAL (PLAINTIFF).*

Civil Procedure Code s. 373—"Order"—"Decree"—Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 588. *Kalian Singh v. Lekhraj Singh*, (1), *Jagdish Chaudhri v. Tulshi Chaudhri* (2), *Zahuri v. Din Nath* (3) and *Jogodindro Nath v. Sarut Sunduri Debi* (4) referred to. *Ganga Ram v. Data Ram* (5) not followed.

THE plaintiff sued in the Court of the Munsif of Pilibhit for the demolition of a wall which, he alleged, the defendants had wrongfully constructed upon land belonging to him. While the suit was pending in the Munsif's Court the plaintiff applied under s. 373 of the Code of Civil Procedure for leave to withdraw his suit with liberty to bring a fresh suit on the same cause of action, on the ground that since the filing of the plaint the defendants had made further erections upon land belonging to him. The Munsif rejected this application, and proceeding to try the suit on the merits, dismissed the plaintiff's claim.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Bareilly) holding that the first court should have allowed the plaintiff to withdraw, made an order under s. 373 of the Code in his favor.

Against this order the defendants appealed to the High Court. The appeal coming on for hearing before a single Judge, the respondent (plaintiff) took a preliminary objection that no appeal lay from

* Letters Patent Appeal No. 28 of 1894.

(1) I. L. R., 6 All. 211. (3) Weekly Notes 1893, p. 204.
(2) I. L. R., 16 All. 19. (4) I. L. R., 18 Cal. 322.
(5) I. L. R., 8 All. 82.

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The defendants thereupon appealed under s. 10 of the Letters Patent.

Mr. *J. Simeon*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

EDGE, C. J. and BANERJI, J.—This is an appeal brought by the defendants in the suit under s. 10, of the Letters Patent. In the Court of the Munsif the plaintiff asked permission to withdraw from the suit with liberty to bring a fresh suit. The Munsif declined to give such permission, and finally made a decree dismissing the suit. The plaintiff appealed from that decree, and in the Court of first appeal he urged that there were sufficient grounds for the granting of permission to him to withdraw the suit with liberty to bring a fresh suit. The Judge of the Court of first appeal, holding that view, gave permission under s. 373 of Act No. XIV of 1882, to the plaintiff to withdraw the suit with liberty to bring a fresh suit, and stated that the result would be that the decree of the Munsif would be set aside. That order was within the power of the Court of first appeal by reason of s. 582 of the Code. From that order granting permission the defendants appealed to this Court. The appeal lay to a single Judge, and our brother Blair, holding that no appeal lay from an order under s. 373 of Act No. XIV of 1882, dismissed the appeal. From that decree of our brother Blair the defendants have brought this appeal. Mr. *Simeon* for the appellants has relied upon the decision of Mr. Justice Straight in *Ganga Ram v. Datt Ram*, (1) which case was very similar to the present, there having been there a decision by the first Court and permission granted under s. 373 by the first appellate Court. On the other hand Mr. *Viddya Charan Singh* relies upon the decision of Mr. Justice Oldfield and Mr. Justice Brodhurst in *Kalian Singh v. Lekhraj Singh*, (2), the decision of our brother Burkitt in *Jagdish Chaudhri v. Tulshi Chaudhri*, (3), the decision of our brother Aikman in *Zahuri v. Dina*

(1) I. L. R., 8 All 82.

(2) I. L. R., 6 All 211.

(3) I. L. R., 16 All 19.

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Nath, (Weekly Notes for 1893, p. 204) and the decision of Mr. Justice Trevelyan and Mr. Justice G. Banerji, in the case of *Jogodindro Nath, v. Serut Sunduri Dobi* (1). In support of the appeal there is merely the decision of Mr. Justice Straight. In the case in which he expressed that opinion Mr. Justice Tyrrell, who was sitting with him, expressed no opinion on the point. There are thus in support of the contrary view the decisions of Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Trevelyan, Mr. Justice G. Banerji, Mr. Justice Burkitt, Mr. Justice Aikman and the decision at present under appeal of Mr. Justice Blair. The balance of authority is certainly in favor of the respondent. When permission is given under s. 373 there is no formal or other expression of an adjudication upon any right claimed or defence set up, and such a permission does not decide the suit, or, if the permission be given in the course of an appeal, the appeal or the suit. Consequently, the order giving permission is not a decree as defined in s. 2 of Act No. XIV of 1882. It is, however, an order granting permission, but it is not one of the orders which is appealable under s. 588 of the same Act. When an order is made under s. 373 in the course of an appeal permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn. We dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt, Chief Justice, and Mr. Justice Banerji.

January 18.

JANKI KUAR (JUDGMENT-DEBTOR) v. SARUP RANI AND ANOTHER (DECREE-HOLDERS)*

Execution of decrees—Civil Procedure Code, ss. 253, 582, 583—Security for performance of decrees of appellate Court—Method of enforcing such security.

Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such

* Letters Patent Appeal No. 9 of 1894.

(1) I. L. R., 18 Cal 322.

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security in the manner provided for by s. 253 of the Code of Civil Procedure. *Bans Bahadur Singh v. Alughla Begum* (1) followed. *Thirumalai v. Ramayyar* (2) and *Venkapa Naik v. Basingapa* (3) approved. *Kali Charun Singh v. Balgobind Singh* (4) and *Tokhan Singh v. Udwant Singh* (5) dissented from.

In this case the decree-holders had obtained a decree from the Court of the Subordinate Judge of Cawnpore. That decree was affirmed on appeal by the High Court. The decree-holders applied more than once for execution, but specifying in their applications the decree of the lower appellate Court and not that of the High Court. Their applications were, however, granted and execution proceeded; but on a subsequent similar application being made the judgment-debtor raised an objection that the wrong decree had been named. The Subordinate Judge overruled that objection, applying the principle of s. 13 of Act No. XIV of 1882. The decree-holders sought to execute their decree by sale of certain property included in a security bond given for the performance of the decree which the High Court might pass in appeal.

The judgment-debtor on her objection being disallowed appealed to the High Court; and pleaded *inter alia* that, the decree having been incorrectly stated in the application for execution, that application could not be granted; that the principle of *res judicata* did not apply, and that the decree-holders could not enforce the decree in respect of the property covered by the security bond without first obtaining a decree for sale under section 99 of the Transfer of Property Act, 1882.

This appeal was dismissed by Burkitt, J., on the 6th of February 1894, and from that decision the judgment-debtor appealed under s. 10 of the Letters Patent.

Babu Becha Ram Bhattacharji, for the appellant.

Munshi Ram Prasad, for the respondents.

EDGE, C. J., and BANERJI, J.—This is an appeal in execution proceedings. The decree-holder obtained a decree from the Court

(1) I. L. R., 2 All. 604.

(2) I. L. R., 13 Mad. 1.

(3) I. L. R., 12 Bom. 411.

(4) I. L. R., 15 Calc. 497.

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of the Subordinate Judge of Cawnpore. His opponents appealed to the High Court. The decree of the Subordinate Judge was confirmed by the High Court with costs. The decree-holder subsequently applied for execution of the decree of the Court of first instance. An order for execution was made and execution proceeded. This is a subsequent application to further execute the same decree, by the assignees of the decree-holder. The judgment-debtor objects that the decree which could be executed was not the decree of the Subordinate Judge, but the decree of the High Court. It is perfectly true that the decree of the Subordinate Judge did merge in the decree of the High Court, but this point is not open to the judgment-debtor now. It was a point which the judgment-debtor could have taken in the previous application. It was not taken by her, and the principle of *res judicata* applies, and she is not now entitled to say that the decree of the Subordinate Judge is not the decree which can be executed. Mr. *Becha Ram* contended that the principle of *res judicata* did not apply because his client did not think it convenient to raise that objection on the previous application. The principle of *res judicata* does not depend upon the convenience, interest or motive of the litigant. It depends upon whether it was open to the litigant to raise the point on the previous occasion, and this point not having been raised by her then she cannot open it now.

In execution of the decree the judgment-creditors, the present decree-holders, asked the Court to put its process in execution by sale of property included in a security bond given for the performance of the decree which the High Court might pass in appeal. It is contended by Mr. *Becha Ram* that s. 99 of the Transfer of Property Act, 1882, limits the rights of these decree-holders, so far as the security bond is concerned, to a suit, and that s. 253 of the Code of Civil Procedure does not apply to the case. Section 99 of the Transfer of Property Act has, in our opinion, no application to the enforcement, by a process of the Court, of a security bond given to the Court for the performance of its decree. We are also of opinion that a security bond given to an appellate Court can be

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enforced in the same way as a security bond can be enforced under s. 253 of the Code of Civil Procedure. We are supported in that opinion by the judgment of the High Court of Madras in *Thirumalai v. Ramayyar* (1), by a judgment of the High Court of Bombay in *Venkapa Naik v. Baslingapa* (2), and by the judgment of the majority of the Full Bench in this Court in *Bans Bahadur Singh v. Mughla Begam* (3). It appears to us that when an appellate Court is given by law power to require a security bond to be given for the performance of its decree, as for instance under s. 545 of the Code of Civil Procedure, 1882, it was not the intention of the Legislature that the bond should be given by one party to the other, or that the bond given to the Court should not be enforced by ordinary process, similar to that under s. 253 in the case of a security bond given in the suit; and it could not have been the intention that the Court should sue upon the bond, or that it should be necessary for the Court to assign the bond for some other person to sue upon it. In our opinion ss. 582 and 583 of the Code of Civil Procedure made applicable in the case of a security bond given to an appellate Court s. 253 of the same Code. The provision in s. 363 of the Code that "in the case of a surety such security may be realised in manner provided by s. 253" was necessary, as s. 363 applies to circumstances arising subsequent to the decree of the first Court and is not in the chapters relating to the powers of appellate Courts. Our attention has been drawn to the case of *Kali Charan Singh v. Balgobind Singh* (4), subsequently followed in the case of *Tokhan Singh v. Udwant Singh* (5). In our opinion the view of law as stated in the cases in Madras and Bombay and by the majority of the Full Bench of this Court is right. The other objections were purely technical, and even from a technical point of view there was no substance in them. We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 13 Mad. 1.

(2) I. L. R., 12 Bom. 411.

(3) I. L. R., 2 All. 604.

(4) I. L. R., 15 Calc. 497.

(5) I. L. R., 22 Calc. 25.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

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BADI-UN-NISSA (JUDGMENT-DEBTOR) v. SHAMS-UD-DIN AND OTHERS
(DECREE-HOLDERS).*

*Act No. XV of 1877, (Indian Limitation Act) Sch. ii, Art. 179—Limitation—
Date of final decree or order of the Appellate Court—Execution of decree.*

Certain plaintiffs obtained a decree for pre-emption in respect of four villages. The defendant appealed, and the lower appellate Court dismissed the appeal. The defendant again appealed, but in his appeal only questioned the decision of the lower appellate Court in respect of two of the villages in suit. In this second appeal the plaintiffs' suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendant's appeal was dismissed as to the other

Held that in respect of all the three villages as to which the final decree stood in favor of the plaintiffs, limitation began to run against the decree-holders from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate Court's decree. *Hur Proshad Roy v. Enayet Hossein* (1), *Sangram Singh v. Bujharat Singh* (2) and *Mashiat-un-nissa v. Rani* (3) distinguished.

THE facts of this case are as follows :—

The plaintiffs-respondents obtained a decree for pre-emption in respect of shares in four villages sold under a single instrument for a single price, *viz.*, Ujhani, Qayam-ud-dinpur, Hasanpur and Bhonka. The defendant appealed in respect of all four villages, and the lower appellate Court upheld the decree of the Court of first instance on the 19th of December 1889. The defendant appealed to the High Court in respect of Ujhani and Hasanpur only, and on the 16th November 1892 the High Court decreed the appeal as regards Ujhani, but dismissed it as to Hasanpur. On the 9th of March 1893 the plaintiffs applied for execution of their decree by delivery of possession of Qayam-ud-dinpur, Bhonka and Hasanpur. The defendant objected that execution of the decree so far as it related to Qayam-ud-dinpur and Bhonka was barred by limitation. The Munsif, in whose Court the application was made, disallowed the objection.

* Letters Patent Appeal No. 34 of 1894.

(1) 2 C. L. R., 471. (2) I. L. R., 4 All. 36.

(3) I. L. R., 13 All. 1.

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The judgment-debtor appealed and her appeal was decreed by the Subordinate Judge.

The decree-holders then appealed to the High Court, which, on the 19th of April 1894, decreed the appeal and restored the order of the Munsif.

From this decree the judgment-debtor appealed under s. 10 of the Letters Patent.

Munshi *Ram Prasad*, for the appellant.

Babu *Datti Lal*, for the respondents.

EDGE, C. J. and BANERJI, J.—The respondents here obtained a decree for pre-emption of certain shares in four villages, which we shall call respectively No. 1, No. 2, No. 3 and No. 4 villages. The appellant, who was the defendant in the suit, appealed that decree to the Court of the District Judge. The District Judge on the 19th of December 1889, dismissed the appeal and confirmed the decree of the Court of first instance. From that decree of the District Judge, the defendant appealed to this Court, in respect only of villages 1 and 3. By his appeal he did not question the decree so far as villages 2 and 4 were concerned. On the 10th of November 1892, this Court varied the decree of the Court below by dismissing the plaintiff's suit so far as village No. 1 was concerned, and dismissed the defendant's appeal as to No. 3. On the 29th March 1893, the plaintiffs applied for execution of their decree in respect of villages Nos. 2, 3 and 4. To that application the defendant objected in respect of villages 2 and 4 that the execution was barred by three years' limitation. The Court executing the decree disallowed the objection. The Subordinate Judge in appeal reversed the decree of the first Court and allowed the objection. The plaintiff appealed to this Court, and Mr Justice Tyrrell in appeal reversed the decree of the Subordinate Judge and restored that of the Court of first instance. From that decree of Mr. Justice Tyrrell this appeal has been brought under s. 10 of the Letters Patent.

It has been contended by Munshi *Ram Prasad* for the appellant that the decree of the District Judge became final as to villages 2

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and 4, and that the three years' limitation prescribed by article 179 of schedule ii of Act No. XV of 1877, began to run, so far as villages 2 and 4 are concerned, from the 19th of December 1889, which was the date of the decree of the District Judge in the appeal in the suit. He has cited the following cases:—*Hur Proshad Roy v. Enayet Hossein* (1), *Sangram Singh v. Bujharat Singh* (2) and *Mashiat-un-nissa v. Rani* (3); but in these cases all the parties to the suit were not parties to the various appeals from the decree in the suit. The decree of this Court in the appeal in the suit as a matter of fact varied the decree in the suit by dismissing the suit of the plaintiffs as to one of the villages. There was consequently, in our opinion, no final decree between these parties until the decree of this Court was made. It is true that this Court, in the appeal to it, was bound to treat as final the rights of the parties *quā* villages 2 and 4, as those villages were not the subject of appeal to it, but still it was the decree of the High Court which became the final decree between the parties to the suit. This case is distinguishable from those cited to us, for in those cases, as some of the parties to the earlier decrees were not parties to the subsequent decrees, the earlier decrees became final in the suit, so far as they were concerned, as between themselves, but here the final decree in the suit between the parties was the decree of this Court. We are, consequently, of opinion that paragraph 2 of article 179 of schedule ii the Indian Limitation Act, 1877, applies in this case, and that the application for execution was in time.

The appeal is dismissed with costs.

Appeal dismissed.

- (1) 2 C. L. R., 471. (2) I. L. R., 4 All. 36
(3) I. L. R., 13 All. 1.

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PRIVY COUNCIL.

THAKUR PRASAD, PETITIONER (APPELLANT) v. FAKIR-ULLAH, OBJECTOR,
(RESPONDENT).

On appeal from the High Court at Allahabad.

Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off, ss. 373, 649, of the Code of Civil Procedure inapplicable here—Act VI of 1892, ss. 4 and 5.

It is clear, both from the Code of Civil Procedure itself, and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. Section 647, Civil Procedure, cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of, the passing of Act VI of 1892, sections 4 and 5.

A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation.

Held,—That the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation.

Held, also, that although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the court, the petitioner's right to renew his petition, within due time, remained. The provisions of section 373, which could only have applied through the effect of section 647, had not been rendered applicable thereby to petitions for execution.

The judgment in *Sarju Prasad v. Sita Ram* overruled (1). That in *Bunko Behary Gangopadhy v. Nil Madhub Chaitopadhy* (2) approved.

Appeal from decree (7th January 1890) of the High Court (3) reversing a decree (18th December 1888) of the Subordinate Judge of Allahabad.

The effect of striking off the list of pending cases an application for execution came into question on two points in this appeal. First, as to whether a prior application had been annulled by being struck off, or still remained a fresh starting point for limitation, in respect of a renewal of the application within three years: secondly, whether or not the High Court had been right in applying the

Present: LORDS HALSBURY, HOBHOUSE, SHAND, AND DAVEY, AND SIR R. COUCH.

(1) I. L. R., 10 ALL., 71.

(2) I. L. R., 18 Calc., 635.

(3) I. L. R., 12 ALL., 179.

provisions of s. 373 of the Code of Civil Procedure, on the construction that they had been rendered applicable to petitions for execution by s. 647; and in disallowing a second application where no liberty to present a fresh application had been given by the Court which struck off the first.

The appeal arose out of objections taken by the respondent, judgment-debtor, to the execution of a decree of the 11th of April, 1883, for Rs. 10,320, held by the appellant, who petitioned for execution.

On the 29th of August 1885, the decree-holder's petition was on the file of the subordinate judge, who on that date recorded the order, striking it off, which appears at pp. 180, 181 and at p. 187 (as literally translated by Mahmood, J., in his judgment) of I.L.R., 12 All. On the 28th of August 1888, the decree-holder filed another application for execution, to which the judgment-debtors objected contending that ss. 373 and 374 of the Code of Civil Procedure, as construed in *Sarju Prasad v. Sita Ram* (1) operated as a bar. The Subordinate Judge disallowed the objection on the 18th of December 1888, giving his reasons thus:—

“As regards the first case of Fakir-ullah, objector, it is evident that the pleader for the decree-holder asked for striking off the case for a short time. The words ‘for the present’ were used by the decree-holder's pleader, and were understood by the Court in one and the same sense, and the Court, accepting the prayer of the decree-holder's pleader, struck the case off the file. This proceeding, having regard to the usage which has obtained from a long series of years, meant nothing more than this, that the Court allowed the case to be temporarily struck off, recognizing indirectly the right of the decree-holder's pleader to execute the decree further. Under these circumstances the case of Fakir-ullah is not fully governed by the precedents relied upon by the objectors.”

An appeal was heard by the High Court, (STRAIGHT, and MAHMOOD, J.J.). No distinction was drawn between the facts in the case

(1) I. L. R., 10 All., 71.

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above mentioned and the present one. They decreed the appeal, and set aside the order of the Subordinate Judge. [See *Fakir-ullah v. Thakur Prasad*, (1).] On the 21st of July 1892, the present appeal was admitted. On the 29th of July 1892, Act VI of 1892, to amend the Indian Limitation Act, 1877, and the Code of Civil Procedure was passed with a clause rendering its enactment, in regard to s. 647, applicable hereto.

On this appeal Mr. G. E. A. Ross, for the appellant, argued that the High Court had been in error in holding that by reason of the order passed on the first application for execution, the decree-holder was precluded from making the second application for execution. He was not barred by limitation, for the filing of the first application, though his petition was struck off, gave a fresh starting point for limitation, and the second application was within time. The reason assigned by the High Court was that the first application had been withdrawn, without leave given by the Court, which struck the petition off its file, to renew it, whereby a second application was precluded under s. 373 of the Code of Civil Procedure, that section having been rendered applicable, in their opinion, to executions by the effect of s. 647. But s. 373 was not applicable, and *Sarju Prasad v. Sita Ram* (2) had been wrongly decided. Even if, however, this had been a right construction of s. 647, the proceeding and order of the 5th January 1886, were not a withdrawal of the application for execution of decree, but a petition for permission to stay proceedings for the present time. The explanation given by the Subordinate Judge of the practice before, and down to 1885, with regard to the temporary withdrawal of applications for execution, justified his finding that the facts of this case were not the same as those in the case cited.

Reference was made to Act VI of 1892, enacting that an explanation should be added to s. 647, Criminal Procedure, that it does not apply to applications for execution of decrees and there were cited:—*Tara Chand Megraj v. Kashinath Trimbak* (3); *Eshan*

(1) I. L. R., 12 All., 179.

(2) I. L. R., 10 All., 71.

(3) I. L. R., 10 Bom., 62.

Chunder Bose v. Prannath Nag (1); *Ramanadan Chetti v. Peria-*
tambi Sherrai (2); *Burko Bahary Gangopadhyay v. Nil Madhub*
Chuttopadhyay (3); *Radha Charan v. Man Singh* (4).

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The respondent did not appear.

Afterwards (24th November), their Lordships' judgment was delivered by LORD HOBHOUSE:—

In this appeal the appellant complains that the High Court of Allahabad has erred in refusing to entertain his application to execute a decree obtained by him against the respondents on the 11th of April 1883.

The mode in which the question arises is as follows:—

The appellant first applied for execution on the 20th of August 1885. He did not actively prosecute that application, and on the 5th of January 1886, his pleader stated that the case might be struck off the list of pending cases "for the present." An order was accordingly made striking the case off the list "for default."

On the 24th of August 1888, the appellant made a second application. This was within three years from the date of his first application, and was in good time if the period of limitation was to be reckoned from that date; but out of time if the first application was to be treated as a nullity because it had been struck off the list. The respondents put in a written objection opposing the appellant's second application on two grounds; one was that his first application did become a nullity. The Subordinate Judge treated it as affording a fresh starting point of time within the terms of the Limitation Act XV of 1877, and made an order dated the 18th of December 1888 disallowing the respondents' objection. His opinion on this point appears to be in accordance with many decided cases, and the High Court have not expressed any adverse opinion. This appeal is argued *ex parte*, and their Lordships have to look carefully at the contentions of the appellant; but they have no hesitation in agreeing with the Subordinate Judge that the application was not barred by lapse of time. The point on which

(1) 22 W. R., 512; 14 B. L. R., 143.

(2) 1 L. R., 6 Mad., 250.

(3) 1 L. R., 18 Cal., 635.

(4) 1 L. R., 12 All., 322.

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the High Court dismissed it is quite a different one, which their Lordships go on to state.

By the Civil Procedure Code of 1882 it is enacted in s. 373 that if the plaintiff withdraws from the suit or abandons part of the claim without the permission of the Court to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter or in respect of the same part. By s. 647 of the same Code it is enacted that the procedure therein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction other than suits and appeals.

Some short time ago, in the case of *Sarju Prasad v. Sita Ram* (1) a decision was passed by the High Court of Allahabad, the effect of which is stated by Mr. Justice Straight in the present case thus:—"That where the circumstances and the facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder was prohibited by the rule of s. 373 of the Civil Procedure Code read with the s. 647 of the same Act." And again he says that the principle of s. 373 is properly applicable to execution proceedings, and that a decree-holder who is not desirous to proceed with an application for execution is in the same position as a plaintiff who desires to withdraw from a suit. That principle has been since adhered to in Allahabad.

The Subordinate Judge was of course bound by the ruling of the High Court, but he construed his order of the 5th January 1886 in combination with the statement then made by the appellant's pleader and showed therefrom that further proceedings were contemplated, and that the order ought to be read as giving permission for such proceedings. Incidentally, and by way of showing what hardship would be worked by construing the exact terms of his order as if they amounted to an absolute dismissal of the case, he mentions that the universal practice was to treat orders of

(1) I. L. R., 10 All. 71.

that kind as not constituting any bar to future application by decree-holders.

On the respondents' appeal the High Court refused to construe the order of the 5th of January 1886, according to the interpretation of the Subordinate Judge. They considered themselves bound by the order as recorded. They do not deny the practice as stated by the Subordinate Judge; on the contrary, Mr. Justice Straight refers to it as very loose and as requiring the greater strictness enforced by the ruling in *Sarju Prasad's* case. On this point their Lordships have only to say that they think the Subordinate Judge right in reciting the whole of the record of the 5th of January 1886, which embodied the pleader's statement, in order to get at the true meaning of the order; and that he has given a very reasonable account of its meaning. But they do not further examine that question, because their decision must be rested on the more general ground that the ruling in *Sarju Prasad's* case is erroneous.

It is not suggested that s. 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of s. 647. But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. That is the view taken by the High Court of Calcutta, after consideration of the Allahabad decisions, in the case of *Bunko Behary Gangopadhya v. Nil Madhub Chuttopadhya* (1).

On this construction of s. 647 the reasoning of the High Court in *Sarju Prasad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might

(1) I. L. R., 18 Calc. 635.

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be a succession of applications for execution. Under these enactments a course of practice has grown up all over India. Whether it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay after one contrary decision, and the High Courts of Calcutta and Madras, have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Sarju Prasad's* case.

Their Lordships' attention has been called to the recent Act VI of 1892, which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. That Act is framed so as to apply to the present appeal, and would have controlled their Lordships' opinion had it been the other way. But having regard to the controversies which have arisen, and the difference of opinion between the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code.

The result is that the High Court ought to have dismissed the respondents' appeal with costs. Their Lordships will humbly advise Her Majesty to make that order, thereby restoring the Subordinate Judge's decree of the 18th of December 1888. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. Barrow and Rogers.*

P.C.
1894
November 24.
December 8.

SAIYID MUZHAR HOSSEIN (PETITIONER) AND MUSSAMAT BODHA BIBI
AND ANOTHER (OBJECTORS).

On petition for special leave to appeal from the High Court at Allahabad.

Finality of an order with reference to the admission of an appeal to Her Majesty in Council—Civil Procedure Code, Chapter XLV—Refusal of a certificate, ss. 600, 601—Remand order, ss. 562 and 565.

An order comprising the decision of the Appellate High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one

Present: LORDS HOBHOUSE and MACNAGHTEN, and SIR R. COUCH.

that can never, while this decision stands, be disputed again, is a final decree for the purposes of appeal to the Queen in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit.

Rakimbhoy Habibbhoy v. Turner (1) referred to and followed.

The certificate, of which the grant was part of the procedure in the admission of such an appeal, was refused by the High Court on the ground that the proposed appeal was from an order remanding a suit under s. 562, of the Code of Civil Procedure; and that orders of remand under that section were, by the practice of the Court, treated as not final within s. 595, cl. (a). That practice is probably correct; but here the order only purported to be under s. 562, which was not applicable. The first court had not disposed of the suit upon a preliminary point, so as to have excluded evidence of fact appearing to the appellate court essential; and s. 565 appeared to be applicable rather than s. 562. The appellate court had reversed, once for all, the decision of the first court upon an issue as to the making and validity of a will, which issue governed the whole case.

Petition for special leave to appeal from an order (26th June 1894) of the High Court, refusing a certificate; also for special leave to appeal from an order (11th January 1894), in respect of which the certificate had been applied for and refused.

This *ex parte* petition for special leave to appeal arose out of the proceedings below in a suit in which the principal issue, raising the question whether a valid bequest had been made of property, was decided in the negative by the first court; which left other subordinate issues untried. The decision was reversed on appeal, the High Court, at the same time that it maintained the will, remanding the suit to the first court for the other issues to be disposed of, and purporting to do so under s. 562, Civil Procedure. The plaintiff, in order to obtain admission of an appeal to the Queen in Council, applied for a certificate (sections 595, 598). This was refused, on the ground that the order in appeal was not to be treated as a final one.

The petitioner applied for special leave to appeal for himself, and as representative of his deceased wife, Haidri Begum. The order (11th January 1894), and the order (26th June 1894), refusing the certificate were made in two suits, *Bodha Bibi* and *Nasiban Bibi v. Haidri Begum*, and *Bodha Bibi v. Haidri Begum*,

(1) I. L. B., 15 Bom., 155; s. C. L. R. 18 I. A., 6.

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In these property, including zamindári shares and houses were claimed, the title alleged being that the plaintiffs were assignees under sale-deeds, of the year 1890, of the rights of certain persons who were devisees of that property. The will was stated to be that of Saiyid Ibn Ali, the deceased son of Haidri Begum. The latter with her husband, the present petitioner, answered, denying the existence of any such will, alleging that the sale-deeds were collusive, and asserting that Haidri had inherited the estate of Saiyid Ibn Ali.

The Subordinate Judge fixed several issues, of which the principal related of the alleged testator's death and raised the question whether he had made the alleged bequests. On the evidence adduced, which consisted partly of a letter written by the testator on the 1st August, 1878, relied on as operating as a will, the Subordinate Judge found that no valid will had been made. He dismissed both the suits, holding it unnecessary to proceed with the other issues.

On the appeal of the plaintiffs, the High Court on the 11th January, 1894, reversed these decrees, and made an order purporting to remand under section 562 of the Code of Civil Procedure both suits to be disposed of on the remaining issues. The High Court decided in favour of the plaintiffs as to the will, and refused a certificate on a subsequent application with reference to the admission of an appeal to the Queen in Council on the ground above stated.

Mr. *W. A. Raikes*, for the petitioner, submitted that the order of the 11th January, although it included a remand to the first court, was, in effect, a final decree. It had been decided by the High Court that the alleged testator, Ibn Ali, had made a valid will. This was the principally contested point, it being stated on the other side, that there were reasons why it could not be a valid will, according to Muhaminadan law. The decision of the High Court was one that went far to conclude the whole case, and it was incorrect. Now was the time for the petitioner to appeal from this decision. There was no remand on the question of the making of a valid will, and it could not again be contested unless by appeal to the Queen in Council. It might be that where section 562 was really applicable

and the decision on a preliminary point had excluded evidence, a remand under that section would not be a final decree. But here the case did not fall under that section. Section 565 would have been appropriate.

He referred to *Rahimbhoy Habibbhoy v. Turner* (1).

Their Lordships having on the 24th November, reported to Her Majesty in Council their opinion that the petition should be granted, afterwards, on the 8th December 1894, their reasons were given by LORD HOBHOUSE:—

In this case the value of the property affected by the decree made in two cognate suits appears to be such as would have allowed the High Court to grant leave to appeal in the ordinary course, if they had thought it in other respects right to grant that leave. They have refused it on the ground that the order objected to is not a final order. To see whether it is so or not, it is necessary to ascertain the nature of the proceedings.

The present petitioner is the principal defendant in the suit. The plaintiff's case is that one Ibn Ali by his will gave the property in suit to certain persons, also defendants, who conveyed it to the plaintiff. Several defences were raised. One was of a preliminary nature, *viz.*, that there was a misjoinder, and this was overruled. The next went to the foundation of the plaintiff's claim, being a denial that Ibn Ali made any valid gift to the grantors of the plaintiff. The others were all of a subordinate character. The Subordinate Judge took the evidence and heard the case. He decided against the plaintiff on the question of Ibn Ali's will, which defeated the suit, and made it unnecessary to give judgment on the other issues. The plaintiff appealed from his decree, and the High Court decided that Ibn Ali had made a valid gift; and they remanded the case under section 562 of the Civil Procedure Code to be disposed of on the other issues according to law.

The petitioner applied for leave to appeal, which the High Court refused on the ground above stated. They do not give any reason

(1) I. L. R., 15 Bom., 155; s.c. L. R. 18 I. A., 6.

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for their decision that the order is not final, except that there was a remand under section 562, and that it was the established practice of the Court to treat such orders of remand as not being final orders.

Probably the practice referred to is quite correct. But then the remand contemplated by section 562 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. That is not the present case. The only preliminary point was the misjoinder. To establish the will of Ibn Ali was the first step in the plaintiff's case, and on her failing in that, her whole suit failed. But that does not make the point a preliminary point decided so as to exclude essential evidence. Nor does it appear that any such evidence was excluded. It seems to their Lordships, judging as well as they can on this *ex parte* application, that the High Court has miscarried in purporting to remand under section 562, and that the case would rather fall under section 565 which requires the Appellate Court to decide issues on which the evidence has been taken. However this may be, the question is whether the decree of the High Court is final. It appears to their Lordships that it is final. The case is analogous to that of *Rahimbhoy Habibbhoy v. Turner*, decided by this Board in 1890 and reported in I. L. R., 15 Bom. 155. There the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. Of course the account might turn out in the defendant's favour. But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit. Therefore they thought that leave to appeal should be granted. In this case the will of Ibn Ali is the cardinal point of the suit, and as after the decision of the High Court that can never be disputed again, their order is final, notwithstanding that there may be subordinate inquiries to make.

Their Lordships will therefore humbly advise Her Majesty to grant special leave to appeal.

Solicitor for the Petitioner:—Mr. T. C. Summerhays.

(1) I. L. R., 15 Bom., 155; s. c. I. R. 18. I. A., 6.

APPELLATE CIVIL.

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December 22.*Before Mr. Justice Knox and Mr. Justice Aikman.*GANGA PRASAD (PLAINTIFF) v. LAL BAHADUR SINGH AND ANOTHER
(DEFENDANTS).**Civil Procedure Code, ss. 566, 574—Issue not disposed of by the lower appellate Court—Procedure.*

In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed the decree in favor of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, *viz.*, execution or non-execution in the following words:—
“I do not think the claim made out by the plaintiff on his own evidence.”

Held, that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Code of Civil Procedure and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court.

Kanhai Lal v. Manorath Ram (1), *Madho Singh v. Kashi Singh* (2) and *Durga Dihal Das v. Anoraji* (3) referred to.

THE facts of this case were as follows:—

The plaintiff sued to recover money upon a bond alleged to have been executed in his favor by the defendants. The defendants denied execution. An issue was framed by the Court of first instance (Munsif of Cawnpore) as to whether the bond was or was not executed by the defendants in favor of the plaintiff. The plaintiff upon the day appointed for the hearing tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, and, being satisfied upon the evidence of that witness that the bond was duly executed, decreed the plaintiff's claim: but the Court declined to examine the other witnesses for the plaintiff, apparently on the ground that it considered the evidence of the first witness sufficient to establish the plaintiff's claim.

* Second Appeal No. 262 of 1894, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 2nd January 1894, reversing a decree of N. L. Banerji, Munsif of Haveli, Cawnpore, dated the 5th December 1892.

(1) *Weekly Notes* 1894, p. 19.

(2) *I. L. R.*, 16 All., 343.

(3) *Weekly Notes* 1894, p. 190.

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The defendants appealed. The lower appellate Court (District Judge of Cawnpore) disposed of the sole issue before it, *viz.*, execution or non-execution of the bond in suit, in the following terms:—
“The evidence on the record is very meagre, but I observe that plaintiff only called one witness to prove the bond, Moti Lal, patwári, the writer, and none of the four attesting witnesses to it (Debi, Baldeo, Bhawani and Gokul) were called. The patwári may or may not be an independent witness. The bond is not registered. It appears that appellant's zamindari property is mortgaged to plaintiff for Rs. 2,000. Under these circumstances, if plaintiff did make a further advance at all, he would have done it on better security than an unregistered bond. The appellant's plea as to witnesses seems also well founded. The case had been adjourned owing to plaintiff's absence and defendant had to summon his witnesses for the adjourned hearing. They did not attend. Apparently defendant asked a further opportunity which was refused, but the record is not very clear as to this. However, I do not think the claim made out by the plaintiff on his own evidence.”
The Court proceeded to allow the appeal and dismiss the plaintiff's suit.

The plaintiff thereupon appealed to the High Court.

Munshi Ram Prasad and Munshi Gobind Prasad, for the appellant.

The respondents were not represented.

KNOX and ATKMAN, JJ.—The appellant in this second appeal, was plaintiff in the Court of first instance. He brought a suit based upon a bond alleged to have been executed by the respondents in his favor. The respondents denied execution. An issue was framed as to whether the bond was or was not executed in favor of the plaintiff by the defendants. Upon the day appointed for hearing the case, the plaintiff tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, was satisfied upon the evidence of that witness that the bond had been duly executed, and decreed the plaintiff's

claim. The evidence of the remaining witnesses tendered by the plaintiff was not taken, because the Court, so far as we can judge from an order endorsed upon the written paper under which plaintiff tendered his witnesses for examination, considered that the evidence of the one witness examined by the Court was sufficient to prove the issue. We do not understand how the Court of first instance could have passed an order virtually prejudging the case before it proceeded to hear the defence set up by the defendants. Unless this action admits of some explanation, which is not before us, we have no hesitation in saying that such action on the part of the Munsif was most improper, and ought never to be repeated. The Munsif passed a decree in favor of the plaintiff.

Upon appeal preferred by the defendants, the lower appellate Court disposed of the issue raised before it, *i.e.*, execution or non-execution of the bond, in a manner which we cannot but characterize as most unsatisfactory. That Court was dealing as a Court of appeal with a question of fact, and its decision upon that is by law final, provided there has been no substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. In this, and in other cases which have come before us, we have found strong reasons for doubting whether Courts of first appeal fully appreciate the grave responsibility which the law thus imposes upon them. In the present instance it is difficult to understand how the learned Judge could have brought himself to finally dispose of the question of fact before him by the observation—"I do not think the claim made out by the plaintiff, on his own evidence." This is neither a trial of the issue before him nor a proper judgment under s. 574 of the Code. We have therefore before us in second appeal a case in which there has been in our opinion no trial of the sole issue raised in the case by the lower appellate Court before which it was so raised. It is perfectly obvious that, as the parties are entitled to a trial of the issue, and as the issue has not been tried, in some way or another trial of that issue must still be made. Sitting as a Court of second appeal, we are precluded from trying questions of fact, and this

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issue, which is the sole issue, and the trial of which is essential to a right decision of the suit upon the merits, must be tried by the Court or Courts below. The learned vakil for the appellant moved us to set aside the decree of the lower appellate Court, and to have the case remanded for a second decision. In support of this he cited the cases of *Kanhai Lal v. Manorath Ram* (1), *Madho Singh v. Kashi Singh* (2) and *Durga Dihal Das v. Anoraji* (3). We have very carefully considered all these three decisions, and, as our judgment shows, have been met with the difficulties by which the learned Judges who decided those cases felt themselves pressed. While considering whether we could adopt the procedure laid down in those cases, we find ourselves in this case face to face with the difficulty created by the very positive and imperative provisions of s. 564 of the Code. By that section an appellate Court is expressly debarred from remanding a case for a second decision, except as provided in s. 562. Now in the case before us it is impossible to hold that the lower appellate Court disposed of the appeal before it upon a preliminary point. The case appears to us to fall within the provisions of s. 566. We have above declared that the lower appellate Court has not tried the issue essential to the right decision of the suit upon the merits. We therefore refer that issue for trial to that Court, and as that Court, not having tried, could not legally decide the issue, we direct the lower appellate Court to take all the evidence tendered by the parties, to try the issue before it and to return to this Court its finding thereon together with the evidence. Ten days will be allowed after return within which either party may present a memorandum of objections to the findings.

Issue referred.

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January 10.

Before Mr. Justice Banerji.

QUEEN-EMPRESS v. AJUDHIA.

Act No. XLV of 1860 (Indian Penal Code) ss. 75 457, 511—Attempt to commit house-breaking by night after previous convictions—Sentence.

Section 75 of Act No. XLV of 1860, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions

(1) Weekly Notes 1894, p. 19.

(2) I. L. R., 16 All., 342.

(3) Weekly Notes 1894, p. 190.

of offences falling within Chapter XII or Chapter XVII, such offence being punishable under s. 511. *Sheo Saran Tato v. The Empress* (1). *Empress of India v. Ram Dayal* (2). *Empress v. Nana Rahim* (3) and *Queen-Empress v. Sricharan Bauri* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Banerji, J.

The Government Pleader (Munshi *Ram Pras d*), for the Crown.

BANERJI, J.—The appellant Ajudhia was committed to the Court of the Sessions Judge of Gházipur charged with the offence of house-breaking by night in order to the committing of theft punishable under s. 457 of the Indian Penal Code. He had four previous convictions.

It has been proved by clear and unimpeachable evidence that Ajudhia was caught in the act of digging a hole through the wall of the house of Ram Lakhan, Sonar. There can be no doubt that his intention was to commit theft. As he did not enter the house he was guilty of an attempt to commit the offence punishable under the last clause of s. 457 of the Indian Penal Code, and was properly convicted by the then Officiating Sessions Judge.

On the question of sentence the learned Sessions Judge was of opinion that, as Ajudhia had previous convictions for offences punishable with rigorous imprisonment for three years and upwards under Chapter XVII of the Indian Penal Code, s. 75 of that Code applied to his case. He was further of opinion that the terms of s. 75 precluded him from passing a sentence of transportation which should be of less duration than for life. He also thought that—“whereas s. 457 prescribed a maximum term of fourteen years’ imprisonment even for the first offence, s. 75 of the Indian Penal Code, which refers to second convictions, limits the maximum to ten years’ rigorous imprisonment”. And he held that, although under s. 511 he could have sentenced the accused to seven years’ rigorous imprisonment, if he had no previous convictions, he was limited by the provisions of s. 75 to the power of sentencing the accused to five years’ rigorous imprisonment only by reason of the

(1) I. L. R., 9 Calc., 877.

(2) I. L. R., 3 All., 773.

(3) I. L. R., 5 Bom., 140.

(4) I. L. R., 14 Calc., 357.

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accused having been repeatedly convicted on previous occasions. The learned Sessions Judge has accordingly sentenced Ajudhia to five years' rigorous imprisonment, that being, according to the learned Judge, "the utmost penalty permitted by the law."

On all the above points the views of the learned Sessions Judge are clearly erroneous. Section 75 empowers a Court to award in the case of certain offences mentioned in the section a more severe sentence on a second conviction than that which the offender would otherwise have been liable to. As was held in *Sheo Saran Tal v. The Empress* (1), the object of the section is "to provide for an additional sentence, not for a less severe sentence, on a second conviction," and "recourse should not be had to that section if the punishment for the offence committed is itself sufficient." It could never be the intention of the Legislature that the punishment for an offence on a second conviction should be less than what it would have been on a first conviction. If, therefore, s. 75 applied to the case, the learned Judge was not precluded by its provisions from passing a more severe sentence than that which was admissible under it, if the higher punishment could be awarded for the offence on a first conviction.

The learned Judge evidently overlooked the provisions of s. 59 of the Indian Penal Code in coming to the conclusion that he was precluded by the provisions of s. 75 from passing a sentence of transportation which should be of less duration than for life. Under s. 75, when it applies, an offender is liable to an alternative sentence of ten years' rigorous imprisonment. By s. 59, where the offender is punishable with imprisonment for seven years or upwards, the Court is competent to award the sentence of transportation instead of imprisonment, such transportation not being for a shorter period than seven years, and not exceeding the term of imprisonment which could be awarded for the offence.

In this case the learned Sessions Judge has erred in applying s. 75 of the Indian Penal Code. That section applies, in the case of a second conviction, to offences punishable under Chapter XII or

(1) I. L. R., 9 Calc., 877.

Chapter XVII of the Code. An attempt to commit an offence is itself an offence within the definition of an offence as given in s. 40, and where no express provision is made in any other part of the Code for the punishment of such offence, it is punishable under s. 511. An attempt to commit house-breaking by night is punishable under s. 511 only. That section appears in Chapter XXIII of the Code. Although, therefore, the offence of house-breaking by night is punishable under s. 457, which appears in Chapter XVII, the offence of attempting to commit house-breaking by night is not punishable under that Chapter, but is punishable under Chapter XXIII only. As s. 75 does not apply to offences other than those punishable under Chapter XII or Chapter XVII, the learned Sessions Judge was wrong in applying it to the present case. I am fortified in this opinion by the rulings of this Court in *Empress of India v. Ram Dayal* (1), of the Bombay High Court in *Empress v. Nana Rahim* (2) and of the Calcutta High Court in *Queen-Empress v. Sricharan Bouri* (3).

The appellant, Ajudhia, has been properly convicted of an attempt at house-breaking by night with intent to commit theft. For this offence he was liable, under s. 511, to be sentenced to seven years' rigorous imprisonment, that being one-half of the largest term of imprisonment provided by the last portion of s. 457 for the offence of house-breaking by night with intent to commit theft. The sentence of five years' rigorous imprisonment passed on Ajudhia was therefore a legal sentence, and it was in my opinion a proper one. The appeal is dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS v. BHAROSA.

Act No. XLV of 1860 (Indian Penal Code) ss. 75, 511—Attempt to commit an offence after previous conviction—Sentence.

Section 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress v. Ajudhia* (1) approved.

- (1) I. L. R., 3 All., 773. (2) I. L. R., 5 Bom., 140.
(3) I. L. R., 14 Calc., 357.

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The facts of this case sufficiently appear from the judgment of Edge C. J.

Neither the appellant nor the Crown was represented.

EDGE, C. J.—Bharosa Bhar has appealed against a conviction for an attempt to commit the offence punishable under s. 379 of the Indian Penal Code and the sentence of three years' rigorous imprisonment passed thereon. He has had notice to show cause why he should not be convicted of an offence under s. 451 of the Indian Penal Code and why his sentence should not accordingly be enhanced. The case against him is a very clear one. A prostitute, her brother and her servant were sleeping in the verandah of her house, which was made practically a part of her house by *chiks* or screens which cut it off from the outside. In this inclosed verandah where the persons were sleeping there was a box containing six hundred rupees' worth of jewelry and articles of clothing. The prisoner was caught in the act of trying to remove the box. He was charged with the commission of the offence punishable under s. 457 of the Indian Penal Code. The Officiating Sessions Judge considered that he could not be convicted under that section and convicted him under s. 511 read with s. 379 of the Indian Penal Code. The Sessions Judge went at some length into the question of previous convictions charged against the prisoner. Taking the view which he did of the offence committed by the prisoner, s. 75 of the Indian Penal Code could not possibly apply. Section 75 does not apply to cases which are confined to s. 511 of the Indian Penal Code. The offences which come under s. 511 of the Indian Penal Code must be punished entirely irrespective of s. 75 of that Code. I have had the opportunity of reading the judgment of my brother Banerji in *Queen-Empress v. Ajudhia* (1) where he deals with the question of the applicability of s. 75, and I may say that I entirely agree with the view of the law as in that judgment expressed. As it was, the sentence which was passed by the Sessions Judge was illegal. The utmost sentence of imprisonment that can be passed for the full offence under s. 379 is three years' rigorous imprisonment with

(1) *Supra* p. 120.

or without fine. When the offence committed is only an attempt to commit the offence of theft, s. 511 applies, and the utmost sentence of imprisonment which can be imposed for the offence is half of that which can be given for the full offence. The sentence of imprisonment which may be given for the full offence of theft can only exceed three years' rigorous imprisonment if the accused has been previously convicted of an offence to which s. 75 of the Code applies; but, as s. 75 does not apply to offences under Chapter XXIII, in which s. 511 is, the sentence for the attempt to commit the offence cannot be enhanced by any application of s. 75. In our opinion the accused certainly committed the offence of house-trespass with the intention of committing theft. We set aside the conviction and sentence passed upon the accused and convict him of the offence punishable under the last clause of s. 451 of the Indian Penal Code. The accused admitted a previous conviction under s. 380 of the Indian Penal Code, in respect of which he was sentenced to two years' rigorous imprisonment and 20 stripes. We sentence him under s. 451 of the Indian Penal Code to be rigorously imprisoned for five years. The period of imprisonment already undergone will form part of his sentence. We dismiss this appeal.

BANERJI, J.—I concur.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

ACHHAN KUAR AND ANOTHER (DEFENDANTS) v. THAKUR DAS AND OTHERS
(PLAINTIFFS)*

Hindu Law—Hindu widow—Power of widow of sonless Hindu to mortgage ancestral property—Pardah-nashin woman, conditions necessary to the execution of a valid deed by—Expectancy—Mortgage purporting to be of property in which one of the professed executants had an interest in expectancy only.

One Raja Khairati Lal died in 1866 possessed of considerable property both movable and immovable. He left surviving him a widow, Rani Hulas Kuar, who

First Appeal No. 22 of 1892, from a decree of Maulvi Jafar Husain, Additions Subordinate Judge of Bareilly, dated the 13th January 1892.

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died in 1878, a daughter, Rani Achhan Kuar, married to one Raja Lalji, and two grandsons, sons of Achhan Kuar, Kuar Inayat Singh and Kuar Shamsher Bahadur, the latter of whom died some time subsequent to 1881, as did also his father Raja Lalji.

In December 1877, a mortgage-deed was executed over certain of the ancestral property of the family of Khairati Lal, the ostensible executants being Raja Lalji for himself, and Hulas Kuar, Achhan Kuar and Inayat Singh through Lalji as their general attorney. This deed was to secure a debt of Rs. 10,000 stated to be to some small extent for an advance in cash, and as to the balance in respect of certain previous debts and interest thereon. At the date of this bond both Inayat Singh and Shamsher Bahadur were minors.

In April 1881, Hulas Kuar having in the meanwhile died, and Inayat Singh having attained majority, but Shamsher Bahadur being still a minor, a second bond of a similar nature to the former was executed by Lalji, Achhan Kuar and Inayat Singh for Rs. 20 000, this sum being recited as composed of various debts of earlier date with interest thereon, of an advance to pay Government revenue, an advance for expenses of the marriage of Lalji's daughter and a very small balance in cash.

It was not shown that the debts secured by either of these two bonds were debts incurred for legal necessity by the widow or daughter of Khairati Lal, or that the mortgagees after due inquiry had reasonable grounds for believing that such necessity existed, nor was it shown that the mortgages were entered into with the consent of all the husband's kindred under circumstances which might raise a valid presumption that the debts secured by them were properly incurred.

It was further not shown that the power-of-attorney under which Lalji purported to act in executing the bond of 1877 on behalf of Hulas Kuar, Achhan Kuar and Inayat Singh was ever properly explained to the professed executants or that they understood its import; nor was it shown that either of the bonds was duly explained to and comprehended by the professed executants, other than Lalji himself, in manner required by law in the case of documents executed by *pardah-washin* women; nor, though at the date of the execution of the second bond Inayat Singh had attained the age of majority, did it appear that he signed the bond with any clear knowledge of its contents, or of the liability which he was professing to incur thereby, or otherwise than through the influence brought to bear on him by his father, Lalji.

Held, on suit by the mortgagees to bring to sale the ancestral property which had been of Khairati Lal in his life-time in enforcement of the two mortgages above-mentioned, that the mortgages were not binding on the alleged executants or on the ancestral property at the date of suit in the hands of Achhan Kuar.

Kuar Inayat Singh's interest in the family property in suit could only be affected by the mortgage of the 2nd of April, 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of

the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the document of mortgage, led the lenders of the money to believe that such a necessity existed for the loan as enabled the Hindu daughter to create a valid mortgage on the family property beyond the extent of her own life interest.

The Hindu law which prevails in these Provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent

It is absolutely necessary, before holding that a *pardah-nashin* lady or her property is liable on a contract alleged to have been made by her, or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her or her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner of the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience.

THE facts of this case are fully stated in the judgment of the Court.

Mr. T. Conlan and Mr. D. N. Banerji, for the appellants.

The Hon'ble Mr. Colvin and Babu Jogindro Nalk Chaudhri, for the respondents.

EDGE C.J. and BANERJI, J.—The plaintiffs in the suit, in which this appeal has been brought by the defendants, brought their suit in the Court of the Subordinate Judge of Bareilly to recover Rs. 86,338-13-0, with costs of suit, interest during the pendency of the suit and future interest, by sale of certain ancestral property of the defendants, and they further prayed for a decree against the defendants personally. The suit was brought upon two mortgage

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bonds, dated respectively the 2nd of December 1877, and the 1st of April 1881. The bond of the 2nd of December 1877, was alleged to have been made by Raja Lalji on his own behalf, and by Rani Hulas Kuár, Rani Achhan Kuár and Kuár Inayat Singh through Raja Lalji as their general attorney. The consideration was stated in the bond to be Rs. 10,000, the details of which, as given in the bond, were:—

	Rs.	a.	p.
On account of <i>hundis</i> ...	7,000	0	0
On account of interest upon the <i>hundis</i> ,	188	3	0
On account of the interest of the bond, dated 25th May 1877, in respect of the 2nd quarterly payment ...	500	0	0
	7,688	3	0
Cash ...	2,311	13	0
Total ...	10,000	0	0

The bond of the 1st of April 1881, was alleged to have been made by Raja Lalji, Rani Achhan Kuár and Kuár Inayat Singh. The consideration was stated in the bond to be Rs. 20,000, the summary details of which as given in the bond, were:—

	Rs.	a.	p.	Rs.	a.	p.
Interest on two bonds ...	8,402	10	9			
Deduct previous payment ...	302	10	9	8,100	0	0
In respect of a Rukka, dated 1st December 1880.						
Principal amount ...				10,475	0	0
In respect of the interest on the amount of the Rukka ...				1,300	14	0
In cash ...				124	2	0
				20,000	0	0

The details of the above sum of Rs. 8,100 as given in the bond were:—

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Compound interest in respect of the bond for
Rs. 20,000, dated 25th May 1877, up to end
of March 1881

5,251 10 9

Compound interest in respect of
the bond for Rs. 10,000, dated
2nd December 1877, up to end
of March 1881

3,151 0 0

Deduct previous payment

302 10 9 2,848 5 3

The details of the above sum of Rs. 10,475 as given in the bond, were:—

Rs. a. p.

On 22nd June 1879, for revenue

2,000 0 0

On 5th November 1879, to pay interest to Inti-
zam Begam

1,575 0 0

On 17th May 1880, to defray expenses of daugh-
ter's marriage

2,000 0 0

On 2nd August 1880, to pay interest to Moti
Ram Sah

4,000 0 0

On 9th October 1880, to pay interest to Intizam
Begam

900 0 0

We have set out the above details of the sum of Rs. 20,000, as it will be necessary to consider them carefully later on.

The sum of Rs. 86,338-13-0 claimed is composed of the above-mentioned sums of Rs. 10,000 and Rs. 20,000 and compound interest on those sums amounting to Rs. 56,338-13-0.

The defendants pleaded, *inter alia*, that the bond of the 2nd of December 1877, was executed by Raja Lalji alone during the minority of the defendant Kuar Inayat Singh and without the knowledge of the defendants; that the property alleged to have been hypothecated by the bond was property which had belonged to Raja Khairati Lal and was at the date of the bond in the

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possession of his widow, Rani Hulas Kuar; that the defendants had at that time acquired no right to the estate other than a right of expectancy, and that, if the bond was the bond of Rani Hulas Kuar, there was no such necessity for the loan as enabled Rani Hulas Kuar to charge the estate beyond her own life interest in it.

The defendants admitted that they had executed the bond of the 1st of April 1881, but they pleaded, *inter alia*, that they had executed that bond under the influence and at the earnest request of Raja Lalji; that the transaction was not explained to them, and that they did not understand the document or that the debt admitted or incurred under the bond was such as would create liability upon the estate left by Raja Khairati Lal, which was at the date of the bond in the possession by right of inheritance of his daughter, Rani Achhan Kuar, who then had living two sons, the defendants, Kuar Inayat Singh and Kuar Shamsher Bahadur. The written statement of the defendants is somewhat obscurely and confusedly worded, but we have above given what we have understood to be the meaning of those paragraphs of the written statement which, in the view we entertain of this case, are material to our judgment.

The Subordinate Judge, after what appears to us to have been a perfunctory consideration of this by no means easy case, gave the plaintiffs a decree for sale, but dismissed their claim for a decree personally against the defendants. From that decree for sale the defendants have brought this appeal.

The property included in the bonds in suit is ancestral property which belonged to the joint Hindu family, the head of which in his life-time was Raja Khairati Lal of Bareilly. Raja Khairati Lal married Rani Hulas Kuar, and had by her one child, a daughter, the defendant Rani Achhan Kuar. The Rani Achhan Kuar married Raja Lalji and had issue three sons, the eldest of whom died many years ago, and the others of whom were the defendants Kuar Inayat Singh and Kuar Shamsher Bahadur. Raja Khairati Lal died in 1866. Rani Hulas Kuar died on the 22nd of June, 1878. Raja Lalji died six or seven years ago, and Kuar Shamsher Bahadur died subsequently to the 1st of April 1881, and before the commencement

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of this suit. On the 2nd of December 1877, Kuar Inayat Singh and Kuar Shamsher Bahadur were minors. On the 1st of April 1881, Kuar Inayat Singh, being then between nineteen and twenty years old, was of age, but Kuar Shamsher Bahadur was then still a minor. Rani Achhan Kuar and Kuar Inayat Singh are the defendants to this suit. It must be kept in mind in considering this case that Raja Lalji never had any title to or interest in the property included in the bonds. In 1877, Rani Hulas Kuar's title was solely that of the widow of a sonless Hindu.

Assuming for the moment that the bond of the 2nd of December 1877, was the bond of Rani Hulas Kuar and was not the bond of the defendants, and that they have not by their own acts precluded themselves from denying that the family property is liable to be sold in enforcement of that bond, the plaintiffs, in order to prove its validity as a mortgage affecting the interests of Rani Achhan Kuar and Kuar Inayat Singh in the estate which was of Khairati Lal, must prove that there was legal necessity for raising the money, the consideration for that bond, by a charge on Khairati Lal's estate, or that the mortgagees of that bond in advancing their money gave credit on reasonable grounds to representations that the money was wanted for such necessity. [*Lala Amarnath Sah v. Rani Achhan Kuar* (1).]

If the bond of the 2nd of December 1877, was solely the bond of Raja Lalji, and not the bond of the defendants or of Rani Hulas Kuar, it did not operate as a valid mortgage of any of the property included in it, as Raja Lalji, in his capacity of son-in-law of Rani Hulas Kuar, husband of Rani Achhan Kuar and father of Kuar Inayat Singh, had no power under the Hindu law to charge the property which was of Khairati Lal with the payment of any debt, whether the debt was incurred by Raja Lalji for his own private purposes or was a debt necessarily incurred for the purposes of the family descended from Khairati Lal. The legal obligation of a Hindu son to pay his father's debts not tainted with immorality, extends only to the family property in which he and his father were

(1) L. R., 19 I. A., 196, at p. 201.

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jointly interested as members of a Hindu family, and to such self-acquired property of the father as has come to the son. It does not appear whether or not Raja Lalji had any property of his own. If he had, it is not shown that any property of Raja Lalji came to the hands of the defendants, or of either of them, and no property which was of Raja Lalji is the subject of this suit.

During the life-time of Rani Hulas Kuar her daughter Rani Achhan Kuar had no interest in the estate of Khairati Lal other than one in expectancy. After the death of Rani Hulas Kuar in 1878, and in 1881, Rani Achhan Kuar's title and interest was merely that of the sole daughter of a deceased sonless Hindu. Under the law of the Mitakshara, which applies in this case, the estate of a daughter in property inherited from her father "exactly corresponds to that of a Hindu widow both in respect to the restricted power of alienation and to its succession after her death to her father's heirs and not her own." (Mayne on Hindu Law and Usage, paragraph 526, 3rd ed.) In 1877, and thence hitherto Kuar Inayat Singh's sole title and interest was and is that of a reversioner. So far as the interest of Kuar Inayat Singh in the family property is concerned, as he was, in 1877 and 1881, not in possession, but merely one of the two reversioners who would, on the death of Rani Achhan Kuar, be entitled, if they survived her, to possession, he had in neither of those years any power under the Hindu law to create a mortgage or charge on the family property. Kuar Inayat Singh's interest in the family property in suit can only be affected by the mortgage of the 2nd of April, 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the document of mortgage, led the lenders of the money to believe that such a necessity existed for the loan as enabled the Hindu daughter to create a valid mortgage on the

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family property beyond the extent of her own life interest. In the *Collector of Masulipatam v. Cavalry Fencata Narrainapah* (1) their Lordships of the Privy Council, referring to an alienation made by a Hindu widow of property of her deceased husband, said (at p. 551):—"On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred..... The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." In *Raj Lukhee Dabee v. Gokool Chunder Chowdhry*, (2), their Lordships, referring to an alienation by a Hindu widow, said:—"Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of '*presumptio juris et de jure*,' their Lordships do not think. It is no doubt an element to be taken into consideration and deserving of considerable weight in the estimation of all the evidence of the transaction." In the present instance Kuar Inayat Singh's brother, Kuar Shamsher Bahadur, was alive on the 2nd of April 1881, and had then as much interest in the property as had Kuar Inayat Singh. Kuar Shamsher Bahadur was not in any sense a party to the bond of the 1st of April 1881. It is not suggested that Kuar Shamsher Bahadur consented to the giving of the mortgage, and indeed he could not have consented, for he was then a minor.

If the mortgage of the 1st of April 1881, was not valid as against Rani Achhan Kuar, the fact of Kuar Inayat Singh's having joined in the mortgage could not make it valid as against his interest in expectancy, for, according to the law of the Mitakshara as under-

(1) 8 Moo. I. A. 529.

(2) 13 Moo. I. A. 209 at p. 228.

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stood and acted upon in these provinces, he could not alone, even if he had enjoyed full coparcenary right in possession in the property, have validly sold or mortgaged even his own share without the consent of all the other coparceners, except for the necessary purposes of the joint family; and the Hindu law which prevails in these provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent. Section 6, clause (a), of the Transfer of Property Act 1882, (Act No. IV of 1882), although it does not, except in matters of procedure, apply to transfers which took place before the passing of that Act, embodies a principle which had long been recognised as the law, at least in this part of India, applicable to Hindus.

Rani Achhan Kuar is a *pardah-nashin* lady who keeps strictly to the custom of the *pardah*. It is absolutely necessary, before holding that a *pardah-nashin* lady or her property is liable on a contract alleged to have been made by her or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her or her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner, or the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience.

We shall now consider what were the transactions relating to each of the two bonds in suit here.

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That the bond of the 2nd of December 1877, was executed by Raja Lalji is admitted. On behalf of the plaintiffs it has been contended that Raja Lalji executed that bond as the general attorney of Rani Hulas Kuar, Rani Achhan Kuar and Kuar Inayat Singh. It was not executed by Rani Hulas Kuar, Rani Achhan Kuar or Kuar Inayat Singh personally. The power-of-attorney relied upon by the plaintiffs is a *mukhtarnamah* of the 6th of March, 1877, (document No. 83). That *mukhtarnamah* was the subject of criticism by their Lordships of the Privy Council in *Lala Amarnath Sah v. Rani Achhan Kuar*, (1). The endorsement of the Sub-Registrar shows that before registering the *mukhtarnamah* he read it over to the two ladies and Kuar Inayat Singh and that they verified it. The Sub-Registrar does not appear to have taken the trouble to enquire whether Kuar Inayat Singh was then a minor or of full age. Kuar Inayat Singh was at that time between 16 and 17 years of age. It may be doubted whether any *pardah-nashin* lady who was not a woman of affairs and possessed of a knowledge of business would understand the nature and scope of the power she was conferring by a *mukhtarnamah* such as that in this case. It not only purported to make valid all prior acts of Raja Lalji, but it purported to authorise Raja Lalji to borrow money, to execute documents, to hypothecate, mortgage, sell or otherwise transfer movable and immovable property, and to give a lease of any village, in whole or in part, at any rent he might think proper, and to do all such acts apparently without consulting the ladies or Kuar Inayat Singh. It was a document which, if the ladies thoroughly understood its effect, would have enabled Raja Lalji to divest them of every scrap of property which they possessed. There is no evidence before us to show that the nature and effect of that *mukhtarnamah* were explained to either of the ladies. Rani Achhan Kuar was examined in this case, and we believe her evidence, every word of which appears to us to be of

(1) L. R. 19 I.A. 196.

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importance. She said :—"The villages, buildings and other landed property at Bareilly, Sháhjahánpur and Lucknow are mine. I got them from Rani Hulas Kuár, my mother, who inherited the same from her husband Rája Khairati Lal. On his (Khairati Lal's) death he left a considerable property both movable and immovable as well as outstandings. Rája Lalji was my husband. I remember having executed a *mukhtarnamah* in his name with a view to manage the villages. I did not know that my estate was incumbered. I came to know of the existence of debt when the Paharwalas filed a suit." And later on :—"Raja Lalji never consulted me in matters relating to the management of the estate. He was my elder, *málik*, and out of respect for him I could not interfere. Rája Khairati Lal was not indebted at the time of his death; he had ample money; why should he borrow?" The suit by the Paharwalas to which she referred was the suit brought by Lala Amarnath Sah and others upon a bond in favor of Moti Ram Sah of the 23rd of March 1873, (L. R. 19 I. A., 196). Kuár Inayat Singh (document No. 254) was examined in this case. It appears to us that his evidence, as well as that of Rani Achhan Kuár, was given with moderation and bears the impress of truth. As to Rája Lalji, he said :—"I have not received a single farthing on account of any of these two bonds (the bonds of the 2nd December 1877, and 1st of April 1881). Their amounts may have been taken by Rája Lalji." And later on :—"There was no enmity between Rája Lalji and me. He should be considered my and my mother's well-wisher. A son considers his father his well-wisher, though the other may not be so at heart. It would appear from the fact of institution of the suit and perusal of the bonds that he acted maliciously. Nothing else has been disclosed. It appeared from the bond sued on and the other bonds sued on previously that his proceedings were *malá fide*." And still later on :—"On the death of Rája Khairati Lal the property was managed by Rája Lalji as one having sole authority. He did not use to consult Rani Achhan Kuár or me in regard to the management of the property. On his death, *i. e.*, at the time of the death of Rája Khairati Lal, there were no

debts due against the *riyasat* (estate), but on the contrary there were debts due to us from several persons." As to the *mukhtar-namah* Kuar Inayat Singh said :—"Rája Lalji was a general attorney on my behalf. I do not fully understand the conditions applicable to general and special attorneys, but he used to do all works, and if this is the meaning of a general attorney the Court may consider him to be so," and "I admit the execution of the power-of-attorney executed in favor of Rája Lalji in 1877, but at that time I had not sufficient maturity of understanding to judge of what I was writing."

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The result of the evidence to which we have referred, and which we believe, is that Rája Khairati Lal, who died in 1866, left on his death very considerable unincumbered landed and other property, and left no debts, and that Rani Achhan Kuar understood when she executed the *mukhtar-namah* of the 5th of March, 1877, that she was executing a document which empowered her husband Rája Lalji to act as the attorney and agent of the family in the management of the villages, as, for instance, in granting leases, fixing and collecting rents and giving receipts, and the payment of the Government revenue and other such matters. At the time when the *mukhtar-namah* of the 5th of March 1877 was given it appears from the evidence above referred to that Rani Achhan Kuar or Kuar Inayat Singh had not the slightest reason to suspect that it was or would be necessary to borrow money or to mortgage or sell any part of the family property, and it may be safely assumed that the possibility of, or the necessity to provide for, any such contingency was not present to their minds, and that they did not know that the *mukhtar-namah* was making provision for the happening of contingencies which there was then, so far as they knew, no chance of occurring. There is no more reason to assume that the two *pardah-nashin* ladies and Kuar Inayat Singh understood that the *mukhtar-namah* purported to empower Rája Lalji to mortgage and sell their family property in the future than there is for assuming that they understood that the *mukhtar-namah* purported to ratify and make valid mortgages and sales by Rája Lalji of their family

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property in the then past. On the other hand, as Rani Hulas Kuar and Rani Achhan Kuar were strictly *pardah-nashin* ladies, and as the two male members of the family of Khairati Lal, *viz.*, Kuar Inayat Singh and Kuar Shamsher Bahadur were then minors, and as Khairati Lal's estate comprised much village property, it was convenient, if not absolutely necessary, that some one should be empowered to act as the agent and general attorney of the family in the management of the village property, and the person who would naturally be selected to manage the village property was under the circumstances Raja Lalji, who stood to the persons then interested in Raja Khairati Lal's estate in the position of son-in-law, husband and father. It is not proved, nor is there any suggestion in the evidence, that the scope and effect of that *mukhtarnamah* were explained to any one of the three persons who executed it. Neither Rani Hulas Kuar, nor Rani Achhan Kuar, nor Kuar Inayat Singh, who was then 16 or 17 years old, is shown to have any knowledge of business. It was Raja Lalji, and not they, who managed the estate of Khairati Lal after Khairati Lal's death. They were in the hands of Raja Lalji, who, apparently for his own purposes, and not in their interest, got them to execute the *mukhtarnamah* in the form in which it appears. Unless the fact that Rani Achhan Kuar and Kuar Inayat Singh executed the bond of the 1st of April 1881, in which reference in most general and vague terms is made to the bond of the 2nd of December 1877, be taken as proof that they knew on the 1st of April 1881, that Raja Lalji had made the bond of the 2nd of December 1877, and unless the evidence of Nand Kishore, on which we can place no reliance, is to be believed, there is absolutely nothing to suggest that Rani Achhan Kuar or Kuar Inayat Singh were aware, before the commencement of this suit, or that on Moti Ram Sah's bond, that Raja Lalji was, as their general attorney, acting upon any power to mortgage or sell their family property. The bond of the 25th of May 1877, has not been put before us in evidence, and we are left in the dark as to that transaction and as to the person or persons by whom it was made. We have not been

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informed as to whether or not Intizam Begam obtained a mortgage bond, or if she did, by whom it was made. It was open to the plaintiffs, if it would have been to their interest, to have produced evidence as to those transactions with the object of showing that Rani Hulas Kuar, Rani Achhan Kuar or Kuar Inayat Singh knew that Rája Lalji was pledging their credit or mortgaging their property, if such evidence would have shown anything of the kind. Rája Lalji knew, even if the Sub-Registrar had no reason to suspect the fact, that his son whose signature he obtained to that *mukhtar-namah* was a minor, and that neither his wife nor his son had then any other interest than that of expectancy in the family property, in which he himself had no interest whatever; and yet, exercising the influence which he possessed as a son-in-law, a husband and a father, and apparently without explaining the effect of the *mukhtar-namah*, he procured the signatures to it of these two *pardah-nashin* ladies and his minor son. It is impossible for us under such circumstances to hold that either Rani Achhan Kuar or Kuar Inayat Singh was bound by her or his execution of the *mukhtarnamah* of the 5th of March 1877.

As Rani Hulas Kuar died on the 22nd of June 1878, it is unnecessary to consider whether she was bound by her execution of that *mukhtarnamah*, unless and until it is proved that there was necessity for the making of the mortgage bond of the 2nd of December, 1877, or that the lenders of the money were on proper inquiry reasonably satisfied that such a necessity existed.

It is well established law in India that as against reversioners a recital in a mortgage of the family property made by a female having a limited estate that the mortgage money was advanced for necessary purposes, as, for instance, for the payment of Government revenue, is not evidence that there was in fact any necessity for the loan. Such a recital does not even suggest to our minds that the mortgagees of the 2nd of December 1877, made any reasonable inquiry as to the existence of any necessity for the loan. That bond recites that the Rs. 10,000 were borrowed for the purposes of paying the "Government revenue, seed and *takavi* expenses, &c."

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The detail at the end of the bond represents that a cash payment of Rs. 2,311-13-0, was made and that the balance was in respect of money due on *hundis* and for interest. None of the accounts which have been produced in evidence suggest that any portion of that Rs. 10,000 was advanced for any necessary purpose of the family. The only oral evidence which, if true, suggests that any portion of that Rs. 10,000 was borrowed for necessary purposes is that of Nand Kishore, (document No. 251). He is a pleader practising at Bareilly and is the father of Govind Prasad, one of the persons in whose favor the bond of the 2nd of December 1877, and that of the 1st of April 1881, were made. Nand Kishore was not ostensibly a party to either of those bonds or interested in them. Govind Prasad was at the date of the bond of 1877, 18 or 19 years old, and it does not appear how he at that early age had acquired money to lend on mortgage, but, according to the detail at the foot of the bond, one half of the Rs. 10,000 was advanced by Govind Prasad. Govind Prasad (document No. 250) said :—"I am not fully acquainted with the circumstances of the two bonds on the basis of which I have instituted this suit. They should be ascertained from my manager, Munshi Nand Kishore, pleader, who is my father. The debt was advanced through him." And in cross-examination :—"Munshi Nand Kishore defrays the expenses of this case on my behalf." Govind Prasad apparently knew little or nothing about the bonds or his suit. Nand Kishore in his evidence made a statement in reference to the bond of the 1st of April 1881, to which he was not ostensibly a party, which indicates that he and not Govind Prasad was the lender of the money. He said :—"After that I refused to give money. Then they executed a bond for Rs. 20,000 in my favor." A careful consideration of the evidence of Nand Kishore has satisfied us that it is such as an unscrupulous lawyer, who had become aware of the difficulty of fixing Rani Achhan Kuar and Kuar Inayat Singh and their family property with liability, would give. In our opinion his evidence must be regarded with the greatest suspicion. He said, in reference to the bond of the 2nd of December 1877 :—"Rs. 10,000 was

borrowed owing to drought to pay revenue. The five persons executed a bond for Rs. 10,000, through Raja Lalji, the general attorney. Some money was given in cash and some money was set off against the interest due under the old bond. Rani Hulas Kuar was alive at that time. The bond was executed on her behalf through Raja Lalji." Later on he said:—"I was not present when the bond of 1877 was written." In cross-examination Nand Kishore said:—"The bond for Rs. 10,000, the basis of the claim, was not signed by Kuar Inayat Singh. I do not verbally recollect how much money in cash was given in respect of this bond. A detail of it is given in the bond. The money of the bond for Rs. 10,000, was not given before me. It was given by Mohan Lal, but not in my presence. I know that a conversation about the transaction of the bond of 1877 was held with me and Mohan Lal, but there was more conversation with Mohan Lal than with myself. I had a talk with Raja Lalji and Kuar Inayat Singh. Nawab Abdul Aziz Khan, pleader, sat at that time. The conversation with Mohan Lal did not take place before me. There was a drought in 1877. Revenue was demanded from them and all other *raises*. Raja Lalji told me that there was a demand of revenue and that I should give him money, and that I should make arrangement for money." Mohan Lal is dead, so is Raja Lalji. Kuar Inayat Singh swore positively that Raja Lalji did not consult him in regard to the management of the property, and that he had not received a single farthing on account of either of the bonds in suit. He was not cross-examined as to any conversation with Nand Kishore. With the single exception of the recital in the bond of the 2nd of December 1877, not one piece of evidence has been put before us in corroboration of Nand Kishore's statement suggesting that the Rs. 10,000, or any part of it, was advanced for the payment of Government revenue. We are not satisfied with the evidence of Nand Kishore, and we find that it is not proved that there was any necessity for the bond of the 2nd December 1877, or that those who advanced the Rs. 10,000, made any inquiry as to the necessity for the loan.

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The learned counsel for the defendants-appellants raised further points as to the bond of the 2nd of December 1877, as to which, holding the views which we have already expressed, we do not think it necessary to give any opinion. One of such points was this :—In the commencement of the bond it purports to be by Rájá Lalji, son-in-law, Rani Hulas Kuar, wife, Achhan Kuar, daughter and Kuar Inayat Singh, daughter's son, "and heirs of Rájá Khairati Lal deceased." The bond was executed by Rájá Lalji alone, and nowhere in the bond or in its execution does it purport to have been executed by Rájá Lalji as the attorney or on behalf of any one except himself, and he in the bond is falsely described as one of the heirs of Rájá Khairati Lal. It was contended that the bond was not executed by Rájá Lalji under the *mukhtarnamah* of the 5th of March 1877. We were referred to Story on Agency, paragraphs 145 to 150, and paragraph 160 A; Paley on Agency, 3rd ed. p. 180; Act No. VII of 1882, s. 2; 44 and 45 Vic. c. 41, s. 46; to the observation of Cotton, L. J. in *In re Whitley Partners, Limited* (1) and to Leake on Contracts, 3rd ed. p. 400. It was contended that the endorsement by the Sub-Registrar of the 6th of December 1877, could not affect the construction of the bond and was not evidence against the defendants that the bond had been executed by Raja Lalji as the attorney of anyone.

It was also contended on behalf of the defendants that as the bond of the 2nd of December, 1877, was not in fact executed by the grantors of the *mukhtarnamah* of the 5th of March 1877, Rájá Lalji had no authority under the special powers as to registering documents contained in that *mukhtarnamah* to register the bond on behalf of anyone but himself in his individual capacity, and that the registration as against the defendants was invalid and consequently that s. 49 of the Indian Registration Act 1877, (Act No. III of 1877), applied.

We shall now consider the transaction relating to the bond of the 1st of April 1881.

(1) L. R. 32 Ch. D. at p. 338.

The bond of the 1st of April 1881, was executed by Raja Lalji and Kuar Inayat Singh by their putting their signatures to it, and by Rani Achhan Kuar by her seal being put to it. That bond purports to be for interest amounting to Rs. 8,100 on the bond of the 2nd of December 1877, and another bond for Rs. 20,000 of the 25th of May 1877 and for the following items:—

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	Rs.	a.	p.
" In respect of the <i>Rukka</i> of 1st December 1880.			
Principal amount	10,475	0	0
In respect of the interest on the amount of the <i>Rukka</i>	1,300	14	0
In cash "	124	2	0

Making a total of Rs. 20,000.

The particulars of the sum of Rs. 10,475-0-0 as stated in the bond are as follows:—

	Rs.	a.	p.
On 22nd June 1879, for revenue ...	2,000	0	0
On 5th November 1879, to pay interest to Intizam Begam	1,575	0	0
On 17th May 1880, to defray expenses of daughter's marriage	2,000	0	0
On 2nd August 1880, to pay interest to Moti Ram Sah	4,000	0	0
On 9th October 1880, to pay interest to Intizam Begam	900	0	0

The bond of the 25th of May 1877, has not been sued upon, and we have no information concerning it or of the transaction with Intizam Begam referred to in the above detail beyond that contained in the evidence of Nand Kishore.

If the views which we have already expressed be correct, neither Rani Achhan Kuar, nor Kuar Inayat Singh, nor the family property which was of Raja Khairati Lal was liable under the bond of the 2nd of December, 1877. For the Rs. 4,000 interest to Moti Ram Sah

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neither Rani Achhan Kuar, nor Kuar Inayat Singh, nor their family property was liable. That Rs. 4,000 was due under the bond which was sued upon in the case of *Lala Amarnath Sah v. Rani Achhan Kuar* (1). As to the items of Rs. 1,575-0-0 and Rs. 900, all the information appearing on the record put before us is the following statement of Nand Kishore :—"Rája Lalji and Inayat Singh asked me to get some more money advanced to them. Accordingly I got Rs. 30,000-0-0 advanced to them by the wife of Usman Khan. His wife's name is Intizam Begam; and she obtained a decree." Kuar Inayat Singh was not asked a single question in cross-examination suggesting that he had made any such request of Nand Kishore or that he had been in any way liable to Intizam Begam for a debt or under a bond or under a decree. We place no reliance upon the evidence of Nand Kishore; and beyond that evidence and the fact that Kuar Inayat Singh executed the bond of the 1st of April 1881, nothing has been put before us to suggest, much less to prove, that Kuar Inayat Singh was in any way liable for any debt to Intizam Begam. For all that appears, that debt and the liability for it may have been Rája Lalji's alone. Nand Kishore's evidence, beyond the fact that the seal of Rani Achhan Kuar had been put to the bond of the 1st of April 1881 after that bond had been at one side of the *pardah* read to some one whom he did not see and who was at the other side of the *pardah*, does not suggest that Rani Achhan Kuar was under any liability for any debt to Intizam Begam or even knew that any money was owing by any one to Intizam Begam.

If the item of Rs. 2,000 was advanced on the 17th of May 1880 to defray the expenses of the marriage of Rája Lalji's daughter, these expenses would in ordinary course be borne by her father Rája Lalji, and not by Rája Khairati Lal's estate, and it does not appear why Rani Achhan Kuar or Kuar Inayat Singh or their property should have been liable in respect of those marriage expenses, if they were in fact incurred. As to the interest on the bond of the 25th of May 1877, beyond the entry of the following particulars in the bond of the 1st of April 1881 :—"Compound interest

(1) L. B. 19 I. A. 196.

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in respect of the bond for Rs. 20,000, dated 25th May 1877, up to end of March 1881. Rs. 5,251-10-9,"—the recital in the bond of the 1st of April 1881, that Rs. 20,000 had been found due by Rāja Lalji, Rani Achhan Kuar and Kuar Inayat Singh on two bonds, one of which was stated in the bond of the 1st of April 1881, to be a bond of the 25th of May 1877, and the following statement of Nand Kishore :—" In 1877, I, on behalf of Govind Prasad jointly with Baij Nath, (again said) Magni Ram and Mohan Lal advanced a loan of Rs. 20,000 to four persons, *viz.*, Hulas Kuar, Achhan Kuar, Inayat Singh and Rāja Lalji,"—there is nothing before us to suggest any liability of Rani Achhan Kuar or Kuar Inayat Singh or their family property in respect of that loan of Rs. 20,000 or the interest on it. On the 25th of May 1877, Rani Hulas Kuar was alive and in possession of the family property for the estate of the widow of a sonless Hindu. The interests of Rani Achhan Kuar and Kuar Inayat Singh were merely expectancies, and Kuar Inayat Singh was a minor, and further, there is nothing to show that Rani Hulas Kuar or Rani Achhan Kuar knew of that loan of the 25th of May 1877, or that the transaction was explained to them, or that they or Kuar Inayat Singh or the family derived any benefit whatsoever from the loan of that Rs. 20,000 of the 25th of May 1877. It may be inferred from the evidence of Rani Achhan Kuar and Kuar Inayat Singh that they knew nothing of the loan of the 25th of May 1877.

Another item of those which made up the Rs. 20,000 of the bond of the 1st of April 1881, was that of Rs. 2,000, which, according to the bond, had been advanced on the 22nd of June 1879, for the payment of Government revenue. Outside the bond of the 1st of April 1881, no evidence has been put before us to show that the Rs. 2,000 or any part of it was required in 1879 for the payment of revenue, or indeed that any such sum was advanced for any such purpose, or that the Government revenue could not have been paid at that time out of the rents of the family property. This is what Nand Kishore said as to the consideration for the bond of the 1st of April 1881 :—" Out of the amount of the bond for Rs. 20,000 the

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executants took some Lucknow *hundis* to pay the debt due to Sah Badri Das, because they were in debt, and they further stated that some money was required to meet the expenses of the marriage of the daughter, and a portion of the money was set off against the interest due under the old bonds, and Rs. 124 and odd annas were paid in cash." Nand Kishore said nothing in connection with that bond as to any necessity for the payment of the Government revenue. If any reliance is to be placed on the details given in the bond of the 1st of April 1881, no part of the consideration except the sum of Rs. 124-2-0 was advanced after the 9th of October 1880. The sum of Rs. 1,300-14-0 was, according to the detail in the bond, interest on a *rukka* of the 1st December 1880, given in respect of the items which made up the sum of Rs. 10,475. The item of Rs. 124-2-0 most probably represented the cost of the stamped paper upon which the bond of the 1st of April 1881 was written and the expenses of preparing the bond and getting it registered. We have gone thus at length into the items composing the sum of Rs. 20,000 of the bond of the 1st of April 1881, in order to ascertain, if possible, what was the consideration, if any, for Rani Achhan Kuar and Kuar Inayat Singh making themselves and their family property liable for the payment of the Rs. 20,000 with interest at the rate of 14 annas per centum per mensem, not to speak of a liability for compound interest at 12 per cent. per annum on six-monthly rests.

It is not shown to our satisfaction that Rani Achhan Kuar and Kuar Inayat Singh received any consideration for the bond of the 1st of April 1881.

Let us now see if they or either of them understood the transaction which Rāja Lalji induced them to enter into in 1881. Rani Achhan Kuar swore, and we believe her, that she had never borrowed any money from Thakur Das and Baij Nath of Pilibhit or Govind Prasad of Bareilly and that she had not known until the present suit was filed and the demand was made against her and Kuar Inayat Singh that Rāja Lalji had borrowed any money from the plaintiffs or their firms. Nand Kishore said that Shankar Sahai read the bond of the 1st of April 1881, to Rani Achhan Kuar and

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brought it back to him where he was sitting after her seal had been affixed to it. Later on he admitted in cross-examination that he never saw Rani Achhan Kuar, and he said :—" I did not see anyone with my own eyes affixing the seal. I did not see the person with my own eyes to whom the bond was read out. There was a *pardah* between. I saw the seal from a distance and not from near. It was in the hand of Shankar Sahai. He affixed the seal. I do not recollect wherefrom Shankar Sahai got the seal." There is not one word of evidence placed before us to show that the bond of the 1st of April 1881, or any of the items in it was ever explained to Rani Achhan Kuar. It was a bond which required considerable explanation, and to be carefully explained, if it was desired by Rája Lalji and Nand Kishore that Rani Achhan Kuar and her son Kuar Inayat Singh should understand the transaction to which it referred and the liability which they were asked to undertake in executing it. One use which was made of that bond in the Subordinate Judge's Court, and also before us in this appeal, was to found an argument that Rani Achhan Kuar and Kuar Inayat Singh by executing that bond admitted a liability of themselves and their family property under the bond of the 2nd of December 1877, and indeed a comparison of the bonds of the 1st of April 1881 and the 2nd December 1877 leads us to the conclusion that the object of the reference in the bond of the 1st of April 1881 to the bond of the 2nd of December 1877, and of making the interest in arrear under the bond of the 2nd of December 1877 part of the consideration for the bond of the 1st of April, 1881 was to obtain evidence, by the execution of the bond of the 1st of April 1881 by Rani Achhan Kuar and Kuar Inayat Singh, that they had admitted a liability of themselves and their property under the bond of the 2nd of December 1877. Under the bond of the 2nd of December 1877, the ordinary interest payable was at the rate of one rupee per centum per mensem and the condition as to compound interest was as follows :—" In case of default in payment of interest every three months, the interest will be added to the principal and the creditors will be entitled to take (charge) compound interest at the rate of one rupee four annas per cent. per mensem without regard to the due date or after the expira-

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tion of the term at their pleasure." Under that condition the interest, Rs. 2,848-5-3, in arrear on the 31st of March 1881, under the bond of the 2nd of December 1877, would have borne interest at the rate of one rupee four annas per centum per mensem; whereas by making that interest, Rs. 2,848-5-3, as was done, part of the principal consideration for the bond of the 1st of April 1881, it would bear only ordinary interest at the rate of 14 annas per centum per mensem, and the compound interest on the six-monthly rests under the bond of the 1st of April 1881, was at the rate of only one rupee per centum per mensem. Nand Kishore, who negotiated on behalf of the money-lenders the transaction of the 1st of April 1881, volunteered no explanation of the reasons which induced the money-lenders of 1877, to forego the more advantageous terms of interest as to the sum of Rs. 2,848-5-3, and we cannot conceive what other object they could have had than that of attempting to make evidence to fix Rani Achhan Kuwar and Kuwar Inayat Singh and their family property with liability for the bond of the 2nd of December 1877. If that was their object it would most probably have been frustrated if the bond of the 1st of April 1881, had been explained to Rani Achhan Kuwar and Kuwar Inayat Singh. What chance of explanation or of independent advice had Rani Achhan Kuwar or Kuwar Inayat Singh? It was not to the interest of Rāja Lalji to explain to his wife that she was incumbering her ancestral property. Although Shankar Sahai was an agent of the family, he was, as appears by the Sub-Registrar's endorsement on the bond of the 2nd of December 1877, as far back as 1877, the agent of Rāja Lalji and he was not likely to give information or explanations to Rani Achhan Kuwar or to Kuwar Inayat Singh which Rāja Lalji was unlikely to give. Shankar Sahai, although an agent of the family, was obviously not a confidential servant of Rani Achhan Kuwar. She was *pardah-nashin* as to him, and Kuwar Inayat Singh tells us that Achhan Kuwar did not appear before Shankar Sahai. Even Nand Kishore makes Shankar Sahai stand on the outside of the *pardah* whilst reading the bond of the 1st of April 1881, to some one who was on the other side of the *pardah*. Is it likely that Rani Achhan Kuwar had the deed of the 1st of April 1881, explained to her by Kuwar Inayat

Singh? Kuar Inayat Singh had just come of age, he was then 19 or 20 years of age. In our opinion he entered as blindly into this transaction as did Rani Achhan Kuar. He had no experience of business. Rája Lalji managed every thing. Kuar Inayat Singh said :—"I signed the document of 1881, because filial duty prevented me from disobeying his (Raja Lalji's), order. Also his influence as father prevented me from disobeying his order." We do not believe the statement of Nand Kishore that—"Inayat Singh signed himself after seeing and understanding all the accounts." That Kuar Inayat Singh may have seen that details of the Rs. 20,000 were stated in the bond is possible, but that he understood the accounts, or what those details represented, or what the object of the bond was, or what might be the inference to be drawn from his execution of it, we do not believe. In our opinion Kuar Inayat Singh blindly executed the bond at the bidding of his father Rája Lalji. Nand Kishore, who, on behalf of the mortgagees, negotiated that transaction and saw to the execution of the bond, must have known perfectly well that he was dealing with a helpless woman and her equally helpless son who had no one to advise them. Except the sum of Rs. 124-2-0, to which we have referred, not one farthing was advanced on the execution of the bond after the 1st of April 1881. The balance of the Rs. 20,000, if the detail given in the bond can be treated as reliable evidence for any purpose, consisted of advances made between the 22nd of June 1879, and the 9th of October 1880, not proved in our opinion to have been made to these defendants or for the benefit of their property, and of interest upon loans, for some of which loans neither these defendants nor their property were liable, and for the remainder of which loans it is not in our opinion proved that these defendants or their property was liable. That the plaintiffs or those whom they represent knew that the property which they sought to have mortgaged to them was not the property of Rája Lalji and was the family property left by Rája Khairati Lal, or that they were aware that there was no necessity for incurring the debts appears to be a reasonable inference from the fact that they sought to make the Hindu woman in possession and one of the immediate reversioners parties to the bonds

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so as to bind them, if possible, for advances previously made. They went further, for Nand Kishore attempted to prove at the trial that Kuar Inayat Singh was of full age in 1877. It was proved that he was then a minor, and subsequently, as appears from the finding on the 2nd issue framed by the Subordinate Judge, it was admitted that Kuar Inayat Singh was a minor at the date of the execution of the bond of the 2nd of December, 1877. Even if it be assumed that Kuar Inayat Singh understood the scope and effect of the bond of the 1st of April 1881, that fact would not in our opinion entitle the plaintiffs to the relief claimed by them.

The only relief to which they may be entitled, if at all, is a decree for the sale of the property mortgaged in the two bonds on which their suit is founded. Having regard to the law of limitation they are not entitled to a decree personally against either of the two defendants. As we have shown above, the bond of the 2nd of December 1877, is not binding on Rani Achhan Kuar. It has not been proved that she executed the bond of the 1st of April 1881, with a knowledge of its contents and of the effect of it on her property. So far therefore as her interests in the property are concerned, the mortgages on which the plaintiffs rely cannot be enforced against those interests.

Kuar Inayat Singh has no present vested interest in the property. His interests are those of a reversioner expectant on the death of his mother, Rani Achhan Kuar. A mortgage of such interests during the life-time of Rani Achhan Kuar cannot affect the property in the hands of Rani Achhan Kuar. We have pointed out in an earlier part of the judgment, that, under the Hindu law which prevails in these Provinces, there is no power in a reversioner to sell or mortgage his interests in expectancy. Under the ordinary law in this country also he has no such power. The Code of Civil Procedure, 1882, exempts in s. 266, clause (k), contingent interests of this description from liability to sale in execution of a decree. The same was the rule under the Code of 1877. Under Act No. VIII of 1859 also it was held, in *Ram Chunder Tantra Doss v. Dharmo Narain Chuckerbutty* (1), that the interest of an heir

(1) 15 W. R., F. B. 17.

according to Hindu law, expectant on the death of a widow in possession was not property, and was not rendered liable to attachment and sale in execution of a decree by s 205 of that Act. Kuar Inayat Singh, therefore, could not pass any title to the plaintiffs under the mortgage of the 1st of April 1881, and in any view their suit is liable to be defeated.

To sum up, we find that in 1877, Kuar Inayat Singh was a minor, and consequently was not bound by his execution of the *mukhtarnamah* of the 5th of March 1877, or by the bond of the 2nd December, 1877.

We find that the *mukhtarnamah* of the 5th of March 1877, was not explained to Rani Achhan Kuar, and that she understood the *mukhtarnamah* merely conferred power on Raja Lalji to act as the agent of the family in the management of the village property, and did not understand that it conferred power on him to mortgage or sell the family property, and that she was not bound by it.

We find that Raja Lalji had no authority to execute the bond of the 2nd of December 1877, on behalf of Rani Achhan Kuar, or of Kuar Inayat Singh, or to borrow money on their account.

We find that it is not proved that there was any family necessity for borrowing the money, the alleged consideration for the bond of the 2nd of December, 1877, or for the mortgaging of the family property.

We find that it is not proved that the mortgagees of the bond of the 2nd of December 1877, satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond. We find that neither Rani Achhan Kuar nor Kuar Inayat Singh nor their family property is liable by the bond of the 2nd December 1877.

We find that the bond of the 1st of April 1881, was not explained to Rani Achhan Kuar, and that it is not proved that she understood that bond or the liabilities it purported to create or admit.

We find that it is not proved that there was any family necessity for the making of the bond of the 1st of April 1881, or that the

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mortgagees of that bond satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of the bond.

We find that it is not proved that Rani Achhan Kuar or Kuar Inayat Singh, or their family property was under any liability in respect of any part of the money, the alleged consideration for that bond, or that they or either of them received any consideration for the making of the bond.

We find that the bond of the 1st of April 1881, is not proved to be a bond binding upon Rani Achhan Kuar or her interest as a Hindu daughter in the family property, and that under such circumstances, and Kuar Shamsheer Bahadur being then alive and having an equal interest with Kuar Inayat Singh in the family property, and Kuar Inayat Singh having merely an interest in expectancy in the family property and being incapable under the Hindu Law of mortgaging or selling his interest in expectancy, no valid mortgage of the family property was effected by the bond of the 1st of April 1881, and no valid mortgage existed to the making of which he, as a reversioner, could consent.

We further find that Raja Lalji either with the active assistance or with the knowledge and connivance of Nand Kishore, who was acting for the mortgagees of the bond of the 1st of April 1881, took an undue advantage of his position as father and of the youth and inexperience and want of business knowledge of Kuar Inayat Singh, in procuring the execution of the bond of the 1st of April 1881, and that when Kuar Inayat Singh executed that bond he did not understand its object or its effect.

The Subordinate Judge on the ground of limitation dismissed the claim of the plaintiffs for a decree personally against Rani Achhan Kuar and Inayat Singh. From that dismissal there has been no appeal.

We allow this appeal, and dismiss with costs in both Courts so much of the plaintiffs' suit as was not dismissed by the Subordinate Judge.

Appeal decreed.

REVISIONAL CRIMINAL.

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Before Mr. Justice Aikman.

QUEEN-EMPRESS v. KELLIE.

Act No. XLV of 1860 (Indian Penal Code), s. 409—Criminal breach of trust—Conviction for criminal breach of trust on general deficiency in account.

An accused person may be charged with criminal breach of trust in respect of a general deficiency, and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. *Reg. v. Lloyd Jones* (1); *Reg. v. Chapman* (2); *Reg. v. Wolstenholme* (3); and *The Queen v. Lambert* (4); referred to.

THIS was an application for revision of an appellate order of the Sessions Judge of Cawnpore sustaining the conviction of the applicant for the offence of criminal breach of trust as an agent, punishable under s. 409 of the Indian Penal Code. The applicant, Archibald Kellie, was the agent at Cawnpore of the firm of Messrs. Ullmann Hirschhorn & Co, the head office of which is in London. The firm has a branch in Calcutta which imports piece-goods, thread, &c, and sells them through its agents. It was Kellie's duty to sell in Cawnpore the goods sent him by the Calcutta branch and to remit the proceeds to Calcutta. He was also bound to send to Calcutta cash abstracts showing his transactions. He had been dilatory in sending in his accounts, and in consequence of this Mr. Tilemann, the manager of the Delhi branch, and Mr. Sonderegger, an assistant in the Calcutta branch, met at Cawnpore, and on the 28th of August 1894 checked Kellie's accounts. According to those accounts, which were in Kellie's own handwriting, he ought to have had in hand a cash balance of Rs. 3,041-0-8; but all that he had was Rs. 113-7-0, there being thus a deficiency of Rs. 2,927-9-8. In respect of this deficiency Kellie was charged with the offence punishable under s. 409 of the Indian Penal Code and convicted, and his appeal was dismissed by the Sessions Judge.

The judgment of Aikman, J., after stating the facts as above, thus continued :—

Mr. C. Ross Alston, for the applicant.

(1) 8 C. and P., 288.
(2) 1 C. and K., 119.

(3) 11 Cox. Cr. Ca. 313.
(4) 2 Cox. Cr. Ca. 309.

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The Government Pleader (Munshi *Ram Prasad*), for the Crown.

The case for the petitioner has been well argued by *Mr. Ross Alston*. The main ground relied on by the learned counsel for the petitioner is that a conviction for criminal breach of trust on a general balance of account is bad in law.

In support of this he referred to *Reg. v. Lloyd Jones* (1). In that case Alderson, B., observed :—"It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." The cases of *Reg. v. Chapman* (2) and *Reg. v. Wölstenholme* (3) were also relied upon.

The propriety of these rulings has been doubted even in England. With reference to the ruling in *Reg. v. Lloyd Jones*, the following remarks are made in Roscoe's Criminal Evidence, 10th edition, page 477 :—"When a person is employed in the receipt and payment of money, it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson, B., in *Reg. v. Jones* (1) were to be taken in their strict sense, it would be impossible ever to procure a conviction for embezzlement when there were running accounts between the parties." And the author goes on to suggest that there was in the case referred to some misapprehension of the principles of law applicable to the question. I would also refer to the case of *The Queen v. Lambert* (4) decided in 1847. In that case, when the cash in the hands of the accused, an employé in the Customs Department, was checked, it was found to be short by £270 of the amount which, according to his books, ought to have been in his possession. The accused had by virtue of his employment both to receive and pay away money on account of Government. It was contended on his behalf that the charge could not be supported in the absence of evidence to prove the appropriation of any particular sum from any one person. Erle, J., said :—"I think that the offence is sufficiently made out, within the

(1) 8 C. and P., 288.

(2) 1 C. and K., 119.

(3) 11 Cox. Cr. Ca. 313.

(4) 2 Cox. Cr. Ca. 309.

meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself and that he absconded or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums or the part of which sum or sums have been embezzled."

But, be the law in England what it may, I have no hesitation in holding that, according to Indian law, an accused person may be charged with criminal breach of trust in respect of a general deficiency, and that it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. It is enough if the accused person has sufficient notice of the accusation he has to meet, and that he had in the present instance.

To hold otherwise would, to use the words of Erle, J., result in a "constant failure of justice." It was further argued by the learned counsel for the petitioner, on the strength of the ruling in the case *Rex v. Edward Hodgson* (1), that, as the prisoner's accounts were not shown to be incorrect, there was therefore no embezzlement, but merely a default of payment. But it is not in respect of accounts that a charge is made in such cases; it is in respect of the disappearance of a certain sum of money. The accounts may be kept in a faultless manner whilst peculation is going on; on the other hand, it is possible to imagine that accounts may be kept in a slovenly manner and that there may be many omissions in them, even whilst any suspicion of dishonesty is negatived. In the case referred to by the learned counsel it was said:—"If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not felony. It is but matter of account." In this case, however, there was something more than the mere fact of not paying over the balance.

(1) 3 C. and P., 422.

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It appears from the evidence of Mr. Tilemann and Mr. Sonderegger that when questioned as to this deficiency Kellie admitted that he had taken the money, and their evidence is borne out by the terms of a letter (Exhibit G.) written by Kellie to Mr. Sonderegger on the 30th of August 1894.

The learned counsel for the applicant also addressed the Court in mitigation of sentence. The punishment which has been sustained was a sentence of two years' rigorous imprisonment. Having regard to the circumstances of the case, I am of opinion that this punishment was not a bit too severe. This was not the case of an employé yielding on a solitary occasion to temptation. A large amount was embezzled, and it appears from the evidence of Mr. Sonderegger that Kellie admitted that peculation had been going on for some eighteen months. The nature of the defence set up by the applicant does not tell in his favor, as it amounted to an insinuation that the missing amount had been taken by Messrs. Tilemann and Sonderegger, an insinuation which I concur with the lower Courts in thinking to be baseless.

For the above reasons I reject the application and direct that the records be returned.

APPELLATE CIVIL.

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January 22.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAIDAR SHAH (APPLICANT) v. JAMNA DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, ss. 350, 359 - Insolvency - Powers exercisable by Court under s. 359 - Withdrawal of application by applicant without permission to renew - Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.

A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by

* First Appeal No. 91 of 1893, from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 12th June 1893.

a creditor, pass an order of imprisonment under that section ; and if on the motion of a creditor it has ordered the imprisonment of the applicant, it cannot subsequently act under the last clause of s. 359. *Kadir Bakhsh v. Bhawani Prasad* (1) referred to.

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.

THE facts of this case were as follows :—

One Hafiz Syed Haidar Shah applied on the 4th of February 1891 to the District Judge of Meerut under s. 344 of the Code of Civil Procedure to be declared an insolvent. With his application he put in a schedule setting out the amount and particulars of his property and other matters which the law requires should be set out in such an application. A day was fixed for hearing the application, and on the 20th June 1891, the application was heard and the applicant was examined. On the 22nd of June 1891 the applicant stated to the Court that he withdrew his application for being declared an insolvent and prayed that the insolvency case might be struck off. Upon this the District Judge passed the following order :—
“ On application of the applicant in person, the petition of insolvency may be permitted to be withdrawn on the costs of the opposing creditors being paid.” Nothing further took place until the 16th of November 1892, when one of the creditors, *i.e.*, The Bank of Upper India, Ltd., a creditor in whose presence the order of the 22nd of June 1891 had been passed, represented to the Court that the costs, payment of which had been ordered, had not been paid, and asked that the proceedings might be revived. No section of the Code was quoted as supporting such a request, but an order was passed calling upon the appellant to appear and show cause why his application to be declared an insolvent should not be revived. No cause was shown within the time granted, and on the 29th of November 1892 the Court directed that the application to be declared

(1) I. L. R. 14 All. 145.

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an insolvent be revived and taken up at the point it had reached on the 20th of June 1891. The parties and their witnesses were directed to be present on the date fixed for their presence. The appellant did not appear, but on behalf of the Bank of Upper India an affidavit was filed declaring that Hafiz Syed Haidar Shah had, on the 12th of June 1892, transferred his entire property to his wife in lieu of dower with the object of defrauding creditors. No other evidence of any kind appears to have been taken, but the Court recorded an order setting out that—"as it would appear that this transfer amounts to a fraudulent transfer to defeat creditors and that the applicant has been guilty of concealment of debts, the Court orders that the applicant be called upon to appear on Saturday the 22nd instant at 11 A.M. and show cause why he should not be committed to prison under cl. 5 of s. 359, C. P. C., at the request of the opposing creditors." On this adjourned date an appearance was made on behalf of Haidar Shah, and it was argued that s. 359 would not apply, as there had been no decision under s. 350 of the Code of Civil Procedure. It was further contended that no fraud of any kind on the part of Haidar Shah had been proved, and the jurisdiction of the Court to revive, as it was called, the proceedings which had come to a close on the 22nd of June 1891, was disputed. The objections were overruled, the learned Judge holding that no decision under s. 350 was required, and that all that was necessary was that at any time during the hearing under s. 350 it should have been proved that there had been a fraudulent transfer or an act of bad faith. Upon the affidavit already mentioned, and upon an admission by the vakil for Haidar Shah that on the 12th of June 1892 his client had transferred a portion of his property in favor of a person whom the Judge terms a creditor not named by the applicant in his list of creditors, it was held that there had been a fraudulent transfer and an act of bad faith regarding the matter of his application. The objection taken to the jurisdiction of the Court was also overruled. The Judge held that his order permitting withdrawal was only conditional; that as the condition had not been fulfilled, sanction

was finally refused, and the hearing under s. 350 was still subsisting on the 12th of June 1892. The Judge then proceeded to order that Haidar Shah be, at the instance of the represented creditors, and at their costs, "imprisoned in the civil jail for one year, unless he shall sooner satisfy the said opposing and represented creditors." On the same date, and on the representation of the vakil for those of the creditors who were present, the above order was amended, and a new order issued directing that the applicant was under s. 359 to be arrested and conveyed to the jail to suffer simple imprisonment for six months. It is this last order from which the present appeal has been filed. That order was, however, followed by a further order directing that, as Haidar Shah had absconded, the case under the last clause of s. 359 of the Code be referred to the Magistrate of the District to the end that Haidar Shah might be dealt with under s. 87 and the following sections of the Code of Criminal Procedure.

The judgment of the Court (Knox and Aikman J. J.) after stating the facts as above, thus continued :—

Mr. *Abdul Majid*, and Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, and Munshi *Jwala Prasad*, for the opposite parties.

This order (*i.e.* that under the last clause of s. 359 of the Code of Civil Procedure), it is hardly necessary to point out, was certainly not one in accordance with law. All that the last clause of s. 359 authorises, under certain circumstances, which did not arise in the present case, as there had been an order passed under the first clause of the section, is that the Court may send an applicant for insolvency before to the Magistrate to be dealt with according to law. In the present case the Judge had already adopted the first of the two courses prescribed in s. 359 and had no power to have recourse to the second alternative. The meaning of this section appears to have been somewhat misunderstood. What the section requires is that if a Court be moved thereto by a creditor it shall, under the circumstances set out in the section, sentence the applicant to imprisonment. This is the only course open to a Court when set in motion at the instance of

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the creditors. If there be no application by any creditor, the Court is still empowered, if it consider the case calls for such an order, to proceed *suo motu* and to send the applicant to the Magistrate. It cannot, unless moved by a creditor, pass an order of imprisonment. The case of *Kadir Bakhsh v. Bhawani Prasad* (1) (Edge, C. J., and Straight, J.) was cited to us in the course of the argument. There are certain expressions in the judgment in that case which appear to be opposed to the view we have taken. Straight, J., there held that when a creditor applied to a Court to exercise its jurisdiction under s. 359 it was open to the Court either itself to punish the applicant for insolvency or to send him before a Magistrate to be dealt with according to law. In our opinion the wording of the section is against this interpretation. Omitting the words immaterial to the decision of the point raised, the section runs as follows:—

“Whenever at the hearing under s. 350 it is proved that the applicant has (a) been guilty, &c.,—the Court shall, at the instance of any of his creditors, sentence him by order in writing to imprisonment for a term which may extend to one year from the date of committal; or, the Court may, if it think fit, send him to the Magistrate to be dealt with according to law.”

The repetition in the last clause of the words “the Court,” and the fact that the word “shall” is used in the one clause and the word “may” in the other lead us to think that the one course is not intended to be an alternative to the other when the Court is set in motion by a creditor. Had an alternative been intended we should have expected to find the word “shall” in both clauses or the word “may” in both clauses.

The insertion of the words “at the instance of any of his creditors” between the words “shall” “and sentence” support the same view.

The intention of the Legislature apparently was to restrict the Court to the one course of sending the applicant to be dealt with by a Magistrate when the Court of itself, and without being moved

(1) I. L.R. 14 All. 145.

thereto by a creditor, comes to the conclusion that the applicant should be punished for any act of bad faith he is proved to have committed; and the reason probably is that, in this event, the Court is, as it were, itself the prosecutor.

We have the authority of the learned Chief Justice for saying that he concurs in the interpretation which we now put upon this section.

To return to the order from which this appeal is filed. It is contended that that order and all the proceedings taken after the 22nd of June 1891 are without jurisdiction; that the Judge could not revive the proceedings, and that no fraud on the part of the appellant had been proved at any hearing under s. 350. It appears to us that this contention is good and must prevail. The only authority in the Code of Civil Procedure for withdrawal of proceedings once commenced before a Civil Court is that contained in s. 373, which by s. 647 applies to proceedings under Chapter XX of the Code. That section gives a plaintiff, and similarly in the case before us gave the applicant, a choice of withdrawing from a suit or application with or without the permission of the Court before which his suit or application stands. No restriction of any kind is placed upon his withdrawing without permission of the Court: he is liable, if he so withdraws, for such costs as the Court may award, and is precluded from bringing a fresh suit or application in the same matter. This is totally different from a power given to a Court, as is given in other sections of the Code, to make the payment of costs precedent to an order which the Court intends to pass. The only case in which a Court may, under this section, impose any condition upon a plaintiff who seeks to withdraw is where that plaintiff asks the Court for permission, not only to withdraw, but also for liberty to bring a fresh suit for the same subject matter. In this case the applicant stated that he withdrew without any further thought or suggestion that he intended to, or wished to, bring a fresh application. The case fell within the second paragraph of section 373, and the order passed by the Court should have been to

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the effect that as the applicant has asked to withdraw from the application he be adjudged to pay the costs of the opposing creditors. It follows therefore that any condition imposed by the Judge as to costs being paid precedent to permission to withdraw was without jurisdiction and must be regarded as mere surplusage. The proceedings determined on the 22nd of June 1891, and no longer subsisted after that date for any purpose whatsoever. At the hearing it was contended that an applicant for insolvency finding the case going against him, and after trouble taken by the creditors to prove fraud, might, if he could withdraw unconditionally, by so doing escape the penalties provided by law under section 359 for the punishment of fraudulent debtors. Such an argument overlooks the existence in the Code of s. 643, which in our opinion does provide for and meet such a contingency. In view of the above finding it becomes unnecessary for us to take up the question of fraud, and we would only remark here that up to the 22nd of June 1891 no fraud had been proved, and no evidence of fraud given even after that date. The affidavit filed by the Bank and the very qualified admission made by the pleader for Hafiz Syed Haidar Shah, do not amount to proof of fraud. For these reasons we allow this appeal and set aside the order of the Court below with costs. There was an application filed in connection with this appeal by one Shankar Lal. It was not supported, and therefore it stands dismissed.

Appeal decreed.

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January 28.

Before Mr. Justice Blair and Mr. Justice Burdett.

ABDUR RAHMAN (DECREE-HOLDER) v. SHANKAR DAT DUBE (OBJECTOR).*

Civil Procedure Code, s. 234--Execution of decree--Attachment during lifetime of judgment-debtor--Application after death of judgment-debtor to bring his representatives on to the record of the execution proceedings--Procedure.

In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act No. XIV of 1882: but if the property has been attached during the lifetime of

*First Appeal No. 248 of 1892, from an order of Kuar Bharat Singh, Officiating Judge of Jaunpur, dated the 3rd September 1892.

the judgment-debtor, it then comes into the hands of the law and the attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property it is not necessary to implead anyone as a legal representative.

The facts of this case were as follows :—One Abdur Rahman had obtained a money decree against Raja Hari Har Dat Dube, on the 30th of April 1890, for a sum of Rs. 820-8-0. On the 15th of November 1890, two boxes containing shawls were ordered to be attached, and the attachment was effected in the month of December. The sale was stayed under an order of the District Court pending the disposal of the suit in which the judgment-debtor was one party and his brother Shankar Dat, the present respondent, was the other. On the 23rd of June 1891, an application was made to strike off the execution proceeding, but to maintain the attachment, with leave to apply again for further steps in aid of execution. The case was ordered to be struck off, the attachment maintained, and the permission prayed for given. A further application was made in relation to the same attachment. The attachment still remained subsisting at the time of the death of the judgment-debtor, on the 13th of January 1892. A further application was made in execution for the attachment of a sum of 1,000 rupees payable under an agreement between the deceased judgment-debtor and the present respondent, then due for the month of November of that year. The Court made an order prohibiting Raja Shankar Dat from paying that money to the deceased judgment-debtor. The order was still subsisting at the time of the death of the judgment-debtor. On the 11th of December 1891, an application was made that Raja Shankar Dat be ordered to pay into Court the sum of Rs. 500, then due from him to the judgment-debtor. An order was made granting that application. Notice was duly served on Raja Shankar Dat's agent. On the 6th of January 1892, an application was made for the attachment of a sum of money (about 200 rupees) then deposited in the Rent Court and standing to his credit, and an order of attachment was issued accordingly. At a date subsequent to these attachments and while they were all three subsisting, Raja Hari Har Dat, died. The

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present appeal arises out of an application made to the Court in which the proceedings then were to put upon the record, as legal representative of the deceased, his brother, the Raja Shankar Dat, and his widow Rani Sahodra Kuar. Objection was taken upon the part of Raja Shankar Dat, but not upon the part of the widow. The Court, referring to a judgment already delivered, and which had relation to the execution of a decree obtained by another plaintiff against the judgment-debtor in the case, refused to put the names upon the record as representatives, alleging that he did so for the reason given in the previous case. It appears that the judge probably did not notice that the one case was in no sense upon all fours with the other. In that case execution was sought against the zamindari property, and such property was not at the time of the decease of the judgment-debtor under attachment. The Court refused to put either of the names upon the record. It is against that order that Mr. *Ghulam Mujtaba* appeals.

After stating the facts as above, the judgment of Blair J. thus continued :—

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. T. Conlan, Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the respondent.

It appears to us that the ruling of the Full Bench of this Court in the case of *Sheo Prasad v. Hira Lal* (1) is a binding authority upon the question at issue in this matter. It is needless to follow in detail the erroneous reasons given by the Judge below in dealing with this matter. It is clear to us that this is a case which is really decided by the ruling above referred to. It was there held by the Full Bench that s. 234 of the Code of Civil Procedure applied only to cases in which after the death of the judgment-debtor the decree-holder sought to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment in the suit of the judgment-creditor. In the view of the Court which decided that case section 234 contemplates that the property which was of the judgment-debtor in his lifetime may

(1) I. L. R., 12 All. 440.

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not only have come to the hands of his legal representative, but may, before the making of the application under the section have not been duly disposed of by the representative. In this case it appears to us that no item of the property attached has come into the possession of the legal representative, whose liability under s. 234 of the Code of Civil Procedure is expressly limited to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. That being so, we think the Court below, though for wrong reasons, is perfectly right in refusing to put upon the record the names of the respondents as representatives of the deceased judgment-debtor. It seems to be settled law that no such representative need be put on the record. *Mr. Ghulam Muftaba* is in our opinion entitled to take such further steps in the execution proceedings as he may be advised, and that no impediment can arise from the fact of there not being on the record any legal representative of the deceased judgment-debtor. The appeal is dismissed with costs.

BURKITT, J.—I concur in the judgment which has been pronounced and desire to add a few words only. The application made by the decree-holder on the 18th of February 1892, and the 5th of March 1893, to bring Raja Shankar Dat and Rani Sahodra Kuar on the record in the execution proceedings was properly rejected by the District Judge, not for the reasons given by him, which, in my opinion, have no bearing on the matter, but because the applications so made were applications for which the law makes no provision whatsoever. Those applications were apparently modelled on the lines of s. 368 which provides for the substitution of names in the place of the deceased defendant in a suit; but under Act No. VI of 1892 and the recent rulings of their Lordships of the Privy Council such procedure cannot be adopted in execution proceedings. In such proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor his proper course is that marked out by s. 234 of Act No. XIV of 1882, but if the property has been attached during the lifetime of the judgment-debtor it

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then comes into the lands of the law and attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property, it is not necessary to implead any one as a legal representative. It was therefore in this case quite unnecessary to ask for an order to bring the brother and the widow of the deceased judgment-debtor on the record. It was an order which the Court had no jurisdiction to pass, and in refusing to pass it the Court was right, though, as I said before, the reasons it gave for that refusal are wrong and irrelevant.

Appeal dismissed.

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February 4.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. SRI LAL AND OTHERS.

Act No. XLV of 1860 (Indian Penal Code), ss. 159, 160—Affray—"Public place."

Held that a chabutra which was neither a place to which the public had a right of access, nor a place to which the public were ever permitted to have access, was not, though it adjoined a public road, a "public place" within the meaning of s. 159 of the Indian Penal Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal* and *Babu Satya Chandar Mukerji*, for the applicants.

The Government Pleader (*Munshi Ram Prasad*, for the Crown.

EDGE, C.J., and BANERJI, J.—This is an application for revision of an order of the Sessions Judge of Farakhabad dismissing the appeal of the applicants from a conviction under s. 160 of the Indian Penal Code.

The fighting appears to have taken place on a *chabutra*, which from the evidence in the Court below appears to have been private property adjoining a public thoroughfare. We infer from the evidence that that *chabutra* was neither a place to which the public had a right of access, nor a place to which the public were used to

have access, nor was it a place to which the public were ever permitted to have access, though it adjoined a public road. We must look to s. 159 of the Indian Penal Code to see what are the ingredients of the offence of an "affray." S. 159 runs as follows:—

"When two or more persons by fighting in a public place, disturb the public peace, they are said to commit an "affray." It will be observed that this section does not make fighting "in public," which is likely to disturb the public peace, an affray. The fighting disturbing the public peace which is an affray, is fighting which takes place in a "public place." No doubt the fighting in this case on the *chabutra* was fighting in public, because the public could see what was taking place.

Some of the statutes in England make acts penal which are done in public, others make acts penal which are done in a public place, so that in the criminal statute law in England, the distinction is, it will be observed, between doing an act in public and doing an act in a public place. As the *chabutra* was not a place to which the public had by right or by permission, or by usage or otherwise, access, we must hold that it was not a public place, although any member of the public walking along the street could walk on to it, but in doing so he would be committing a trespass.

Under these circumstances we must set aside the convictions. We acquit the applicants, and order that the fines, if paid, be refunded.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

NATTHU SINGH (DEFENDANT) v. GULAB SINGH (PLAINTIFF).*

Limitation—Suit for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption—Act No. XV of 1877, (Indian Limitation Act) sch. ii, art. 118.

Article 118 of sch. ii of the Indian Limitation Act applies only to suits for a declaration that an adoption is invalid or in fact never took place; it does not apply

* First Appeal No. 93 of 1893, from a decree of Bábu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 23rd January 1893.

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to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that a given adoption is invalid. *Basdeo v. Gopal* (1), *Ghandharap Singh v. Lachman Singh* (2), *Pada-jirav v. Ramrav* (3) and *Lala Parbhu Lal v. Mylne* (4) referred to.

The plaintiff in this case sued for possession of a share in certain immovable property which had been in her lifetime in the possession of one Musammat Lachecho, the widow of one Tarsi Ram. The property in suit, with the exception of two plots, once belonged to Zorawar Singh, the common ancestor of the parties save the defendants Zauki Ram and Murli Singh who were mortgagees from Musammat Lachecho. Zorawar Singh had five sons, three of whom, i.e., Tarsi Ram, Ganga Ram and Khushal Singh, died in his lifetime. Zorawar Singh died in 1864, leaving him surviving two sons, Gulab Singh (the present plaintiff) and Shib Singh, and sons of two other sons.

Musammat Lachecho [Kuar, widow of Tarsi Ram, got a one-fifth share of the property left by her father-in-law Zorawar Singh; and it is now undisputed that she was in separate possession of the share up to her death in November 1891.

On the 19th of June 1876, Musammat Lachecho executed a hypothecation bond in favor of Zauki Ram and Murli Singh. The mortgagees brought a suit in 1888 upon the bond. The plaintiff, Gulab Singh, and Natthu Singh were added as defendants to this suit under s. 32 of the Code of Civil Procedure. Gulab Singh contested the validity of the mortgage on the ground that Musammat Lachecho was in possession as a Hindu widow in lieu of her right of maintenance and that the transfer by her was void. The Court held that Musammat Lachecho was in adverse and proprietary possession of the property and gave the plaintiffs a decree for a portion of the amount claimed. On appeal the defendants got a decree for a larger amount, and in other respects the finding of the Lower Court was upheld. Upon the death of Musammat Lachecho Natthu Singh set up his right as the adopted son of Tarsi Ram and his right was recognized by the Revenue authorities.

(1) I. L. R., 8 All., 644.
(2) I. L. R., 10 All., 485.

(3) I. L. R., 13 Bom., 160.
(4) I. L. R., 14 Calc., 401.

The plaintiff claimed to recover possession of a share in the property on the ground that it had been given to Musammat Lacheho in lieu of maintenance and that on her death it reverted, in part at least, to the plaintiff. He denied that Natthu Singh had been ever adopted by Tarsi Ram as his son, and sued to have it declared that the decree obtained by the mortgagee defendants could not be executed against the property because the interest of Musammat Lacheho came to an end at her death.

The defendant Natthu Singh maintained the validity of his adoption, and also pleaded limitation, and further that the plaintiff on his own showing was not entitled to more than a one-fourth share.

The Lower Court (Subordinate Judge of Aligarh) found that the plaintiffs' claim as against the mortgagee defendants was barred by the principle of *res judicata*; but that as against Natthu Singh and the other defendants the plaintiff was entitled to a one-fourth share of the property in suit, and made a decree accordingly. Natthu Singh thereupon appealed to the High Court.

Mr. *Abdul Raouf*, for the appellant.

Mr. *C. Ross Alston* and *Munshi Ram Prasad*, for the respondent.

EDGE, C. J. and BANERJI, J.—This appeal has been heard with First Appeal No. 117 of 1893. In First Appeal No. 93 of 1893, the defendant Natthu Singh is the appellant, and in First Appeal No. 117 of 1893, Gulab Singh, plaintiff, is appellant. The suit was for possession of shares in a village which were in the possession of the defendant Natthu Singh at the commencement of the suit. The plaintiff was entitled to the decree which he got in the Court below, if Natthu Singh was not adopted, as alleged by him, by one Tarsi Ram. Tarsi Ram was one of the five sons of Zorawar Singh. Gulab Singh, the plaintiff, was one of those sons. Natthu Singh's case was that Tarsi Ram and Tarsi Ram's then wife, Musammat Lacheho, adopted Natthu Singh about two years before Tarsi Ram died. The plaintiff's case is the utter negation of any

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such adoption. The adoption is said to have taken place about 1863. In 1876 (Zorawar Singh having died in 1864), Musammat Lachcho, the widow of Tarsi Ram, who had predeceased his father Zorawar Singh, presented an application to the Revenue Court asking for mutation of names in respect of a certain share in the village to be made in favor of Natthu Singh. She alleged in the proceedings on that application that her deceased husband had adopted Natthu Singh when the latter had been about one year old. As a matter of fact that application was opposed by, amongst others, the plaintiff in this suit, and Musammat Lachcho's name was entered in the revenue papers and Natthu Singh's was not entered.

On the fact of that application having been made in 1876, and opposed by the present plaintiff, Mr. *Abdul Raoof*, for the defendant Natthu Singh, has contended that this suit is barred by limitation. He relies on art. 118 of sch. ii of the Indian Limitation Act, 1877, and in support of his contention further relies on the judgments of their Lordships of the Privy Council in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri* (1), *Mohesh Narain Munshi v. Taruck Nath Moitra* (2), and on a judgment of this Court in *Inda v. Jehangira* (3). The last mentioned case was undoubtedly decided on art. 118 of sch. ii of Act No. XV of 1877; the two cases before their Lordships of the Privy Council were decided upon the former Limitation Act, No. IX of 1871. The article especially referring to adoptions was, in Act No. IX of 1871, art. 129 of sch. ii. The two articles of Act No. XV of 1877 which especially refer to suits relating to adoption are arts. 118 and 119 of sch. ii. Article 129 of Act No. IX of 1871 in words related to suits "to establish or set aside an adoption." It is true that their Lordships of the Privy Council, in the cases to which we have referred, treated the words "to set aside an adoption," in that article, as referring to suits for a declaration that an adoption was invalid. We find also that when the Legislature passed Act No. XV of 1877, they did not use the language of art. 129 of Act No. IX of 1871, but used language in

(1) L. L. R., 13 Cal., 308.

(2) I. L. R., 20 Cal., 487.

(3) Weekly Notes 1890, p. 241.

arts. 118 and 119 which, according to the ordinary construction, would limit those articles to suits, in the one case to obtain a declaration that an alleged adoption was invalid or never in fact took place, and in the other case to obtain a declaration that an adoption was valid. The Legislature in other parts of the schedule, for example, in art. 91 of schedule ii, of Act No. XV of 1877, followed the wording of art. 92 of Act No. IX of 1871, which had reference to suits "to cancel or set aside an instrument not otherwise provided for." We assume that by departing from the language of art. 129 of Act IX of 1871, and by using language in arts. 118 and 119 of the schedule of the present Act, which can only refer to suits for declarations, it was intended that those articles should apply only to suits in which such declarations were sought. In this view we are supported by the decision of this Court in *Basdeo v. Gopal* (1) and *Ghandharap Singh v. Lachman Singh* (2); by a decision of the Bombay High Court in *Padajirav v. Ramrav* (3), and by a decision of the Calcutta High Court in *Lala Parbhu Lal v. Mylne*. (4). This being the case, and the present suit not having been one for a declaration, we hold that art. 118 does not apply and that the suit is not barred by limitation.

We now come to the merits of the suit. Zorawar Singh, the head of this family, died in 1864. His son, Tarsi Ram, whose widow Musammat Lachecho was, predeceased Zorawar. At the time that Musammat Lachecho's name was entered in the revenue papers as representing a one-fifth share in the property left by Zorawar, Zorawar's son, Shib Singh, was alive. Shib Singh was the father of three sons, one of whom was Natthu Singh, who was alleged to have been adopted by Tarsi Ram. It is impossible to believe that, if this adoption had in fact taken place, Shib Singh would not, on the death of Zorawar Singh, have insisted on the right of his own natural son Natthu Singh to have his name entered as the grandson of Zorawar and as the adopted son of Tarsi Ram. He did not insist on anything of the kind. Musammat Lachecho's name was entered. There is another thing which in our opinion is fatal

(1) I. L. R., 8 All., 644.

(3) I. L. R., 18 Bom., 160.

(2) I. L. R., 10 All., 485.

(4) I. L. R., 14 Calc., 401.

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to this alleged adoption. If the adoption had in fact taken place, Natthu Singh ceased to have any share in the interest of his natural father, Shib Singh; but, on the death of Shib Singh, Natthu Singh took an equal share in Shib Singh's property with his brothers and continued to cultivate the *sir* of Shib Singh. Another fact which goes against the adoption is that Musammat Lachcho up to the time of her death in 1891 continued to be not only recorded in respect of the one-fifth share, but actually cultivated it.

There is evidence on the record which we believe, which shows that Tarsi Ram died some years before Natthu Singh was born. Natthu Singh's case depends on his proving that the adoption alleged by him took place in Tarsi Ram's lifetime. Musammat Lachcho, as the widow of Tarsi Ram, was allowed by the family to be entered in the revenue papers in respect of the one-fifth share for her maintenance, though she was not entitled to be so entered. It is very possible that in 1876, owing to some ill-feeling amongst the members of the family she was disposed to put forward Natthu Singh as the adopted son of Tarsi Ram. Whatever was the cause of her line of conduct at that time, her subsequent conduct was inconsistent with any adoption having taken place. On these grounds we dismiss first appeal No. 93 of 1893, with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

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HAMIDA BIBI (PLAINTIFF) v. ALI HUSEN KHAN (DEFENDANT).*

Civil Procedure Code, ss. 366, 588—Abatement of suit—Appeal.

No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure declaring that a suit shall abate, such order neither amounting to a decree nor being specifically appealable under s. 583. *Bhikaji Ram Chandra v. Purshotam*, (1) dissented from.

The facts of this case are as follows:—

The plaintiff sued in the Court of the Subordinate Judge of Shahjahanpur to recover a sum of Rs. 41,686-10-8 as her dower

*First Appeal No. 123 of 1894, from an order of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 26th June 1894.

(1) I. L. R., 10 Bom., 220.

debt, but died shortly after the filing of the suit, and before issues were framed, on the 14th of November 1893. After various adjournments for the purpose of allowing the heirs of the deceased plaintiff to come in, the case was fixed for the 15th of May 1894. On the 10th of January 1894, one Musammat Hamida Bibi, the mother of the plaintiff, applied to be brought on the record as legal representative of the plaintiff in respect of some of the property in suit, but that application was rejected, as it did not contain a schedule of the property, nor was it signed and verified. On the 29th of May 1894, Hamida Bibi again applied to be brought on to the record as a representative of the deceased plaintiff, but this application also was rejected as not being signed and verified, and also as being beyond time. Hamida Bibi accordingly appealed to the High Court.

Pandit *Moti Lal* and Babu *Durga Charan Banerji* for the appellant.

Mr. *Abdul Majid* and Maulvi *Ghulam Mujtaba*, for the respondent.

KNOX and LAKSMAN, JJ.—A preliminary objection is raised by Mr. *Ghulam Mujtaba* to the hearing of this appeal, on the ground that the order appealed from is an order passed under the first paragraph of s. 366 of Code of Civil Procedure and that no appeal is provided for such order by s. 588 of the Code. Our attention was drawn in the course of the argument to the case of *Bhikaji Ramchandra v. Purshotam* (1) in which it was held that such an order is appealable. It was held by the learned Judge who decided that appeal that such an order was virtually "a decree within the meaning of s. 2 of Act No. XIV of 1882, as it disposes of the plaintiff's claim as completely as if a suit had been dismissed." The learned Judges who decided that appeal appear to have overlooked the very important provisions of s. 371, which allow a person claiming to be the legal representative of a deceased to apply for an order to set aside the order of abatement. It cannot therefore be said that an order under the first paragraph of s. 366 is an

(1) I. L. R., 10 Bom., 220.

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adjudication which, as far as the Court expressing it, decides the suit or appeal. Moreover, it is provided by clause (20) of s. 588 of the Code that an applicant whose application for an order to set aside an abatement is refused can appeal from such order of refusal. We sustain the objection and dismiss the appeal with costs.

*Appeal dismissed.*1895
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SHIB CHARAN LAL (DEFENDANT) v. BAGHU NATH (PLAINTIFF).*

Civil Procedure Code, s. 13—Res judicata—Finding in judgment not embodied in the decree and not essential to the making of the decree as framed—Act No. I of 1887 (Specific Relief Act) s. 42.

A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*.

A matter cannot be said to be "directly and substantially in issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1882 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

* Appeal No. 44 of 1894 under s. 10 of the Letters Patent.

The following cases were referred to:—*Krishna Behari Roy v. Brojeswari Chowdranee* (1), *Soorjomonee Dayee v. Suddanund Mohapatter* (2), *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (3), *Radhamadhub, Holdar v. Monohur Mookerji* (4), *Shaikh Enaet oollah v. Shaikh Ameer Buksh* (5), *Niamut Khan v. Phadu Buldia* (6), *Jamant-un-nissa v. Lutf-un-nissa* (7), *Man Singh v. Narayan Das* (8), *Lachman Singh v. Mohan* (9), *Ram Gholam v. Sheotahal* (10), *Anusuyabai v. Sakharan Pandurang* (11), *Devarakonda Narasamma v. Devarakonda Kanaya* (12), *Ghela Ichharam v. Santalchand Jettha* (13), *Tarakant Bannerjee v. Puddomoney Dossee* (14), *Robinson v. Dalip Singh* (15).

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The facts of this case and the arguments on either side are fully stated in the judgments of the Court.

Mr. *Abdul Majid* for the appellant.

Babu *Viddya Charan Singh* for the respondent.

EDGE, C. J. and BANERJI, J.—Raghu Nath, who is the respondent to this appeal, brought in the Court of the Munsif of East Budaun the suit in which this appeal has arisen and made Cheda Lal, Ramji Lal, Sundar Lal, and Shib Charan Lal, defendants to the suit. Shib Charan Lal is the appellant here.

In his plaint Raghu Nath alleged that a certain pacca house had been the property of one Mansukh deceased, that Mansukh died without male issue and left two daughters, *viz.*, Musammat Kishna and Musammat Biba, him surviving, who, having obtained possession of the house for their interest as the daughters of a deceased sonless Hindu, died. Raghu Nath further alleged that he was the son of Musammat Biba, who died in 1890, and that Cheda Lal, Ramji Lal and Sundar Lal were the sons of Musammat Kishna, and that on the death of Musammat Biba, who was alleged by Raghu Nath to have survived her sister Musammat Kishna, he, Raghu Nath, and the defendants Cheda Lal, Ramji Lal and Sundar Lal as the heirs of Mansukh became entitled to the house, each to the extent of one-fourth.

(1) L. R., 2 I.A. 283.

(2) L. R., I.A. Supp. Vol. 212.

(3) L. R., 12 I.A. 23.

(4) L. R., 15 I.A. 97.

(5) 25 W. R. C.E. 225.

(6) I. L. R., 6 Calc. 319.

(7) I. L. R., 7 All. 606.

(8) I. L. R., 1 All. 489.

(9) I. L. R., 2 All. 497.

(10) I. L. R., 1 All. 266.

(11) I. L. R., 7 Bom. 464.

(12) I. L. R., 4 Mad. 134.

(13) I. L. R., 18 Bom. 597.

(14) 5 W. R. P.C. 63.

(15) L. R., 11 Ch. D. 798.

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It was further alleged in the plaint that Musammat Kishna, jointly with the defendants Cheda Lal and Ramji Lal and in collusion with them and without necessity, on the 19th of September 1879, by deed mortgaged the house to the defendant Shib Charan Lal, that Shib Charan Lal subsequently on appeal in suit brought by him in 1891 against Cheda Lal, Ramji Lal and Sundar Lal upon the mortgage of the 19th of September 1879, obtained a decree for sale as against the defendants, Cheda Lal and Ramji Lal, of their interests in the house, which by that decree was declared to be the two-thirds interest, and that Shib Charan Lal's suit for sale as against Sundar Lal was dismissed.

It was alleged in the plaint, as was the fact, that the plaintiff Raghu Nath instituted in 1893 in the Court of the Munsif of East Budaun a suit against these defendants Shib Charan Lal, Cheda Lal, Ramji Lal and Sundar Lal for a declaration that he was one of the four heirs of Mansukh and as such was entitled to a one-fourth share in the house, and that the Munsif, finding that the plaintiff Raghu Nath was not in possession of the house, dismissed the suit.

It was also alleged in the plaint that the defendant Shib Charan Lal in 1893 put his decree for sale in execution.

The plaint concluded with following prayer:—"The plaintiff prays judgment that by declaring that the plaintiff is the owner of, and entitled to, one-fourth of the house bounded as below and situate in Budaun, mohalla Syedpura, he may be put in possession of the aforesaid one-fourth share jointly with the defendants Nos. 1, 2 and 3 (Cheda Lal, Ramji Lal and Sundar Lal) by protesting the same from the demand of the decree of the appellate Court, No. 812 of 1891 (the decree for sale) and the decree of the original Court, No. 516 of 1891."

The defendants Cheda Lal, Ramji Lal and Sundar Lal did not defend this suit. The defendant Shib Charan Lal in his written statement pleaded, *inter alia*, that this suit was barred by s. 43 of Act XIV of 1882 and that the mother of the plaintiff Raghu Nath was one Musammat Gaura, and was not Musammat Biba, and that

neither Musammat Gaura nor Musammat Biba was a daughter of Mansukh.

In the present plaintiff's suit of 1893 he alleged, and the defendant Shib Charan Lal denied, that the plaintiff Raghu Nath was the son of a Musammat Biba and that Musammat Biba was one of two daughters of Mansukh and that the plaintiff Raghu Nath was, as such son of Musammat Biba, entitled to a one-fourth share in the house in question. In that suit the Munsif in his judgment found that issue as to title in favor of Raghu Nath, but, as Raghu Nath had not claimed any decree for possession, the Munsif dismissed the suit under the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877), on a finding that the plaintiff was not in possession, jointly or otherwise, of the house in question.

In the present suit the same Munsif held that by reason of his finding as to title in the previous suit the question of the title of the plaintiff Raghu Nath as one of the four heirs of Mansukh was *res judicata* under s. 13 of Act No. XIV of 1882, and also found as a fact that, apart from the question of *res judicata*, the plaintiff Raghu Nath had in this suit proved his title as one of the four heirs of Mansukh; and finding the other issues in favor of the plaintiff decreed his claim. As to the plea that this suit was barred by s. 43 of Act No. XIV of 1882, the Munsif relied upon and followed the decision of this Court in *Mohan Lal v. Bilaso* (1). From that decree the defendant Shib Charan Lal appealed to the Court of the District Judge. In his grounds of appeal he questioned the correctness of the findings of fact of the Munsif. His fifth ground of appeal was:—"That s. 13, Civil Procedure Code, was not at all applicable, because in the former case the plaintiff's claim was dismissed. An appeal is preferred against a decree and not on the ground of reasons. When that decision has not the effect of *res judicata* (s. 13) against the parties, it does not stand in bar." In that appeal the District Judge of Sháhjahánpur held that the question of the title of the plaintiff Raghu Nath was not *res judicata*, and that s. 13 of Act No. XIV of 1882 did not

(1) I. L. R., 4 All., 512.

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apply; and, finding as a fact that the plaintiff had not proved his title as an heir of Mansukh, he set aside the decree of the Munsif and dismissed the suit. From that decree the plaintiff appealed to this Court. His appeal was heard by a Single Judge, who, holding that the question of title was, by reason of the finding as to title of the Munsif in the previous suit, *res judicata* under s. 13 of Act No. XIV of 1882, reversed the decree of the District Judge, and made, under s. 562 of Act No. XIV of 1882, an order of remand. From that order of remand this appeal has been brought under s. 10 of the Letters Patent of this Court by the defendant Shib Charan Lal.

The only question argued before us was the question of *res judicata*. Mr. *Abdul Majid* for the defendant Shib Charan Lal relied upon the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877) and contended that the finding as to title in the previous suit was immaterial to the decision of that suit; that the decree in that suit having been entirely in favor of Shib Charan Lal, and an appeal lying from a decree and not from a finding in a judgment not embodied in the decree, he could not have questioned that finding by an appeal, and that a finding which could not be questioned by appeal could not in a subsequent suit operate as *res judicata*. Mr. *Abdul Majid* cited the following cases. *Umrao Lal v. Behari Singh* (1), *Ram Sewak Singh v. Nakhed Singh* (2), *Putali Meheti v. Tulja* (3), *Anusuyabai v. Sakharam Pandurang* (4), *Ghela Ichharam v. Sankalchand Jetha* (5), *Devarakonda Narasamma v. Devarakonda Kanaya* (6), *Nundo Lal Bhattacharjee v. Bidhoo Mookhy Debee* (7), *Thakur Magundoo v. Thakur Mahadeo Singh* (8), *Rajah Run Bahadoor Singh v. Mussumat Lachoo Koer* (9), and *Narain Das v. Faiz Shah* (10).

Mr. *Fiddya Charan Singh*, for the plaintiff-respondent Raghu Nath, contended that the finding as to title was a material finding,

(1) I. L. R., 3 All. 297.

(2) I. L. R., 4 All. 261.

(3) I. L. R., 3 Bom. 223.

(4) I. L. R., 7 Bom. 464.

(5) I. L. R., 18 Bom. 597.

(6) I. L. R., Mad. 134.

(7) I. L. R., 13 Calc. 17.

(8) I. L. R., 18 Calc. 647.

(9) L. R., 12 I. A. 23; s. c. I. L. R., 11 Calc. 301.

(10) 24 Pan. Rec. 551.

and even if not material to the decision of the previous suit, the issue as to title was tried between the parties, and, the Court having expressed an opinion on it, the matter became *res judicata*, whether an appeal from the decree in the previous suit could or could not have been brought by Shib Charan Lal; that Shib Charan Lal had an appeal against the decree in the previous suit, as that decree was defective by reason of that finding as to title not having been embodied in the decree, and, even if no appeal lay on the part of Shib Charan Lal from that decree as it stood, he could, under s. 206 of Act No. XIV of 1882, have got the Court to amend the decree so as to bring it into conformity with the judgment by embodying that finding in it, and could then have appealed from the decree as amended. He cited the following cases:—*Krishna Behari Roy v. Brojeswari Chowdranee* (1), *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (2), *Niamut Khan v. Phadu Buldia* (3), *Ram Gholam v. Sheotahal* (4), *Man Singh v. Narayan Das* (5), *Lachman Singh v. Mohan*, (6), *Mohan Lal v. Ram Dial* (7), *Jamaitunnissa v. Lutfunnissa* (8), and the *Duchess of Kingston's case* (9). He also referred to Hukm Chand's Treatise on the law of *res judicata*, paragraph 60, page 131.

It was vigorously contended by Mr. Viddya Charan Singh before us that *Krishna Behari Roy v. Brojeswari Chowdranee* (1), *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (2), *Niamut Khan v. Phadu Buldia* (3) and the judgment of Mahmood, J., in *Jamaitunnissa v. Lutfunnissa* (8) were authorities for the proposition that a finding in a judgment which is not embodied in the decree made upon that judgment operates as between the parties as *res judicata* if the Court which expressed such finding in its judgment was competent to try the subsequent suit.

That proposition is not in our opinion supported by the decision of their Lordships of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowdranee*. In that case Bunwari Lal had brought

(1) L. R. 2 I. A. 233; s. c. 25

W. R. C. R. 1.

(2) 25 W. R. C. R. 225.

(3) I. L. R., 6 Calc. 319.

(4) I. L. R. 1 All. 266.

(5) I. L. R. 1 All. 480.

(6) I. L. R. 2 All. 497.

(7) I. L. R., 2 All. 843.

(8) I. L. R., 7 All. 608.

(9) 2 Smith L. C. 9th Ed., 812.

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a suit to set aside certain patni leases granted to one of the defendants by the widow of one Goursoonder Roy, to whom Bunwari Lall alleged that he had been adopted by the widow as a son. Krishna Behari Roy intervened in the suit; alleging that he and not Bunwari Lall was the heir of Goursoonder Roy. One of the defences set up was that Bunwari Lall had not been validly adopted. The Principal Sudder Ameen found that Bunwari Lall had been validly adopted, but dismissed the suit on the finding that the patni leases could not be set aside. Krishna Behari Roy appealed to the Civil Judge, who, affirming the decision of the Principal Sudder Ameen, dismissed the appeal. From that decree of the Civil Judge Krishna Behari Roy appealed to the High Court at Calcutta. According to the judgment of their Lordships of the Privy Council, the High Court "after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists therefore a final and complete judgment upon the issue raised either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit;" and their Lordships held that Krishna Behari Roy was precluded by the principle of *res judicata* from questioning the validity of the adoption of Bunwari Lall in the subsequent suit which was before them in appeal. Krishna Behari Roy had intervened, not to support the suit of Bunwari Lall to have the patni leases set aside, but to defeat that suit on the plea that Bunwari Lall had no title to the property, and consequently could not maintain the suit. The patnidar had not appealed from the decree of the Principal Sudder Ameen, and the decree of the High Court dismissing Krishna Behari Roy's appeal was made on the ground that Bunwari Lall had been validly adopted, and that was the finding of the High Court to which effect was given by its decree dismissing Krishna Behari Roy's appeal. It accordingly seems to us that it was only by reason of the finding as to the validity of Bunwari Lall's adoption having been given effect to in the decree of the High Court that their Lordships held that finding to be *res judicata* on the question of adoption.

The contention of Mr. *Vidya Charan Singh* to which we are referring, received support from the fact that Markby and Romesh Chunder Mitter, J. J., in *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (1) and Norris, J. in *Niamut Khan v. Phodu Buldia*, (2) obviously, and apparently the other members of the Full Bench in the latter case, assumed, incorrectly in our opinion, that the decision of their Lordships of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowdronnee*, (3) was solely based upon the finding of the Principal Sudder Ameen. Markby, J., at page 226 of 25 W. R. c. R. said:—"So in the case reported in 25 Weekly Reporter, p. 1, the decree in the previous suit, the finding in which was relied on was not before the Privy Council, nor have we been able to examine it, as it was not a decree of this Court, but we may with safety say that the finding relied on was not in the decree, for the suit was dismissed." Norris, J., at page 324 of I. L. R., 6 Calc., referring to an omission from the decree of a Munsif of his finding that a tenure was liable to enhancement, which finding was relied upon as operating as *res judicata*, said:—"The omission of this finding in the decree is not material, because, as pointed out by Mr. Justice Markby in the case of *Shaikh Enaetoollah v. Shaikh Ameer Buksh*, their Lordships when they delivered their judgment in the case of *Soorjomonee Dayee*, had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy v. Bunwari Lall Roy*, did they think it necessary to have the decree before them. As a matter of fact in neither case was the finding relied on embodied in the decree.

In *Shaikh Enaetoollah v. Shaikh Ameer Buksh* (1), the question common to the earlier suit and to that suit was whether the tenure of the tenant was one which allowed of, or precluded, an enhancement of the rent by the landlord. In the earlier suit the Munsif had found that the tenure was not protected from enhancement, but, finding that the grounds upon which enhancement was

(1) 25 W. R. c. R. 225.

(2) I. L. R., 6 Calc., 319.

(3) I. L. R. 2 I. A. 283; s. c., 25 W. R. c. R. 1.

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claimed were not established, gave a decree for rent at the old rate. In that case Markby and Romesh Chunder Mitter, JJ., held that the finding in the earlier suit on the question of title, whether or not it was contained in the decree, might in the subsequent suit, which was then before them in appeal, be relied on as binding between the parties on the question as to whether the tenure was one which allowed of the rent being enhanced. Markby and Romesh Chunder Mitter, JJ., apparently came to that conclusion partly on the view which they entertained as to the basis upon which their Lordships of the Privy Council had decided the question of *res judicata* in *Krishna Behari Roy v. Brojeswari Chowdranee*, and which they expressed in the passage which we have already quoted from their judgment in *Shaikh Enastoolak's* case, and partly from the view which they entertained as to the basis of the judgment of their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* (1). As to that case they said:—"In a case reported in 20 Weekly Reporter 377, certain declarations of right contained in a judgment of this Court delivered in a previous suit were held by the Privy Council to be conclusive, this Court being competent to make them. The decree in that case was not before the Privy Council; it does not appear that the Privy Council thought it necessary; and in fact the decree, which is in the record of this Court and which we have examined, contains none of the declarations relied on by the Privy Council; it is simply a decree for costs." The case to which their Lordships of the Privy Council referred was *Sudanund Mohapattur v. Bonomallee* (2). According to the report of the judgment of the High Court in that case, the High Court made in its judgment the declarations relied upon by their Lordships of the Privy Council in the case before them. It does not appear that any one suggested to their Lordships or informed them that those declarations in the judgment of the High Court had been omitted from its decree, and it may be presumed that their Lordships in deciding that case assumed that the declarations made by the High

(1) L. R. I. A. Supp., Vol. 212; s. c. 12 B. L. R. 304 and 20 W. R. 377.
 (2) 1 Marshall 317; s. c. 2 Hays Reports 205.

Court in its judgment had been embodied in its decree. Consequently we cannot regard the judgment of their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* as deciding or suggesting that a finding in a judgment not given effect to in the decree operates between the parties as *res judicata*. The fact that their Lordships in *Soorjomonee Dayee v. Suddanund Mohapatter* and in *Krishna Behari Roy v. Brojeswari Chowdranee* referred to the judgments of the High Court, and not to the decrees which had been made, does not suggest to us an inference that their Lordships considered that a finding in a judgment not given effect to by a decree can operate as *res judicata*, for in many cases it is absolutely necessary to examine, not only a judgment, but the pleadings, in order to ascertain on what matters a decree is conclusive between the parties or their representatives. That such an examination is not only permissible but necessary in some cases is to be inferred from the judgment of their Lordships of the Privy Council in *Kali Krishna Togore v. The Secretary of State for India in Council* (1). As the two authorities relied upon by the Court in *Shaikh Enaetoollah's* case did not in our opinion support the view as to *res judicata* expressed by that Court, we cannot regard the decision in *Shaikh Enaetoollah's* case as one of authority.

Having regard to the referring order and to the judgment in *Niamut Khon v. Phadu Buldia* (2), it appears that the Calcutta Full Bench took the same view as Markby and Romesh Chunder Mitter JJ., had taken in *Shaikh Enaetoollah's* case of the decisions of their Lordships of the Privy Council in *Soorjomonee Dayee v. Suddanund Mohapatter* and in *Krishna Behari Roy v. Brojeswari Chowdranee* and assumed that the Privy Council had decided in those cases that a material finding in a judgment which was not given effect to in the decree would operate as *res judicata*. In *Jamaitunnissa v. Intfunnissa* (3), Mahmood, J., considered that the decisions of their Lordships of the Privy Council in *Krishna Behari*

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(2) I. L. R. 6 Calc. 319.
(3) I. L. R. 7 All. 606.

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(1) L. R. I. A. Supp., Vol. 212; s. c. 12 B. L. R. 304 and 20 W. R. 377.
(2) 1 Marshall 317; s. c. 2 Hays Reports 205.

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Roy v. Brojeswari Chowdranee (1), and *Soorjomonee Dayee v. Suddanund Mohapatter* (2), supported the decision of the Calcutta Full Bench in *Niamut Khan v. Phadu Buldia*.

In *Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee* (3) and in *Thakur Magundeo v. Thakur Mahadeo Singh* (4), a division Bench of the High Court at Calcutta refused to follow the decision of the Full Bench of that Court in *Niamut Khan v. Phadu Buldia*.

It does not appear from the report in *Man Singh v. Narayan Das* (5), whether the finding as to the bond which was relied upon as *res judicata* was given effect to by declaration or otherwise in any of the decrees in the suit in which the Munsif had found against the bond. Having regard to the finding in that case that the decree upon the bond under which it was sought to sell the property in question had been passed without jurisdiction so far as that property was concerned, the finding that the bond was not a valid bond, would appear to have been a finding immaterial and unnecessary to the decision of the first suit. We are therefore unable to accept the ruling in that case as an authority in support of Mr. Viddya Charan Singh's contention.

It would appear from the report of *Mohan Lal v. Ram Dial*, (6) that the finding relied upon as *res judicata* had been given effect to in the decree by the dismissal of the suit. We shall again refer to that case later on.

It would appear from the judgment of Sir Robert Stuart, C. J., in *Lachman Singh v. Mohan* (7), and from the judgments of Oldfield and Mahmood, JJ., in *Jamait-unnissa v. Lutfunnissa* (8) that those learned judges considered that a party in whose favor a decree is has a right to appeal against the decree as not being in conformity with the judgment by reason of its not having embodied in it a finding expressed in the judgment, if that finding was adverse

(1) L. R. 2 I. A. 283.

(2) L. R. I. A. Supp., Vol. 212.

(3) I. L. R. 13 Calc. 17.

(4) I. L. R. 18 Calc. 647.

(5) I. L. R., 1 All. 480.

(6) I. L. R., 2 All. 843.

(7) I. L. R., 2 All. 497.

(8) I. L. R., 7 All. 606.

to the party in whose favor the decree was. The reason of those learned judges for that view apparently was that such finding would operate as *res judicata*, and consequently that the party considering himself aggrieved by it should have a right of appeal.

Holding apparently a contrary view of the law as to *res judicata*, Turner and Spankie, JJ., in *Ram Gholam v. Sheotahal* (1) held that a party in whose favor a decree was, had a right of appeal against it in order to have a finding against him in the first Court upon which the decree in his favor was not made, considered and finally decided in appeal so as to preclude his opponent from raising that question again.

The opinions on this subject of Sir Robert Stuart, C. J., Turner, Spankie, Oldfield and Mahmood, JJ., to which we have just alluded appear to be opposed to the views expressed by their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Mussunat Lachoo Koer* (2), to which we shall refer later on.

In support of the contention that no finding could operate as *res judicata* against a party if that party had no opportunity afforded to him of questioning that finding by an appeal against the decree, Mr. Abdul Majid mainly relied upon certain dicta in the judgment in *Anusuyabai v. Sakharan Pandurang* (3). In that case West and Nanabhai Haridas, JJ., said:—"In the case of *Jania Gaba v. Hulia Waru* it was said that an incidental finding of a District Court on a question of title in a case not admitting of further appeal could not be *res judicata* as to that point in a future suit. The decision could not be appealed against, and therefore on the incidental question was not final. The same principle applies where an appeal is excluded by the decree: a point is not finally decided against any party who is not allowed the opportunity of questioning the decision, with the exception of the particular points, as in small causes, to the judgment on which a special finality is given by the Statute."

(1) I. L. R., 1 All. 266.

(2) I. L. R., 12 I. A. 23.

(3) I. L. R., 7 Bom. 464.

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It appears, however, to us that the operation of s. 13 of Act No. XIV of 1882, cannot depend on the question whether the parties or either of them is or has been allowed an opportunity of questioning the decision in the particular matter by an appeal against the decree in the suit. If it were a true proposition of law that "a point is not finally decided against any party who is not allowed the opportunity of questioning the decision," a finding of fact by a District Judge in an appeal which reversed the finding of fact on the same matter by a Munsif could never operate as *res judicata*, although the District Judge rightly applied the law in arriving at that finding and rightly applied the law on the fact so found by him. Sections 584 and 585 of Act No. XIV of 1882, would preclude an appeal from the decree of the District Judge in such a case. It would be an anomaly in the law that a material and necessary finding of the Munsif should, if his decree were appealable, but was not appealed against, operate as *res judicata* by reason of s. 13, explanation IV, and that the contrary finding of fact on the same matter by the District Judge, however material and necessary it might be for the decree of the District Judge, should not operate as *res judicata* owing to a second appeal not being, by reason of ss. 584 and 585, permissible in the particular case. Explanation IV of s. 13 of Act No. XIV of 1882 would, in our opinion, make applicable the first paragraph of s. 13 to the decision of the District Judge on the matter, and such application satisfies us that the operation of the principle of *res judicata* under the law in British India cannot depend on the fact that an appeal does or does not lie against the decision of the matter in dispute. Subject to the observation that it may be necessary to examine the judgment and the pleadings in order to ascertain what matters have and what matters have not been decided by the decree, we think that the law on the question of *res judicata* was more correctly expressed in the judgment of the Madras High Court in *Devarakonda Narasamma v. Devarakonda Kanaya* (1) than it was in *Anusujabai v. Sakharam Pandurang*. In *Devarakonda Narasamma v. Devarakonda Kanaya*, Innes and Mu-

(1) I. L. R., 4 Mad., 124.

thusami Ayyar, J.J., said :—"The first defendant, Mr. Shaw represents, is apprehensive that the expression of the Judge's opinion in the judgment as to the adoption said to have been made by her may be held to be *res judicata* upon that point in any suit hereafter instituted. As to this we are of opinion that to see whether a matter is *res judicata* you must look to the former decree. If the decree does not decide the question, it is not *res judicata*. Certain recent decisions appear to have held that the first clause of section 13, Civil Procedure Code, precludes a second trial between the same parties of matters which have been in issue and upon which the judge has expressed his opinion in a former suit. We do not agree in this view. The words 'has been heard and finally decided by such Court' apply, not to the expression of opinion in the judgment, but to what has been decided by the decree." In *Ghila Ichharam v. Sankal Chand Jetha* (1), Sir Charles Sargent, C. J., and Fulton, J., said :—"Where, however, the defendant sets up two grounds of defence to the relief sought by the plaintiff and succeeds on one, which causes the dismissal of the plaint, the decision on the other issue in the plaintiff's favor cannot be said to be material to the determination of the suit : it is, therefore, not *res judicata* and no appeal would lie against it, because, as was remarked by the Privy Council in *Rajah Run Bahadur Singh v. Mussumut Lachoo Koer*, the decree was not based on it, but was made in spite of it."

The question whether a party to a suit in whose favor the decree wholly is can appeal against that decree or against a finding in the judgment not embodied in, or given effect to by, the decree, and the question as to whether a finding in a judgment upon which finding the decree was not based, and in spite of which the decree was made, can operate as *res judicata*, appear to be concluded by the following passage in the judgment of their Lordships of the Privy Council in *Rajah Run Bahadur Singh v. Mussumut Lachoo Koer*, (2). At page 34 their Lordships are reported to have said :—"The widow has not appealed against the decree, nor could she, because it is in her favor, but she has appealed against the finding that the

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(1) I. L. R., 18 Bom., 597.

(2) L. R. 12 I.A., 23.

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brothers were joint in estate. It may be supposed that her advisers were apprehensive lest that finding should hereafter be held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it but was made in spite of it. If she had not appealed, she could have supported the decree on the ground that the Court ought to have decided the question of separation in her favor." Their Lordships threw out a suggestion that objection might have been taken that an appeal against a finding in a judgment did not lie, but, no objection having been taken at the Bar, their Lordships heard the widow's appeal.

The case of *Radhamadhub Holdar v. Monohur Mookerji* (1) affords a good example of the application of the principle of *res judicata*. In that case Matangini, a zamindar, granted a patni lease to Mookerji and subsequently mortgaged the zamindari interest to Mookerji, who obtained a decree for sale upon the mortgage. At the sale which was held in execution of his decree, Mookerji purchased the zamindari interest, i.e., Matangini's interest in the property the subject of the patni lease. Whilst Mookerji's suit for sale was pending another creditor of Matangini got a decree for money against Matangini, and in execution of it brought the zamindari interest of Matangini to sale and that interest was at that sale purchased by Radhamadhub. Radhamadhub after the purchase by him sued Mookerji for rent in respect of the patni holding, and his suit was dismissed on the ground that in Mookerji and not Radhamadhub had become vested Matangini's zamindari interest. The suit in appeal before the Privy Council was one subsequently brought by Radhamadhub against Mookerji for redemption of the mortgage granted to Mookerji by Matangini, and their Lordships having referred to the ground upon which the suit for rent had been decided, said:—"On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem, but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally; who is the true representative of Matangini? Therefore their Lordships conceive

(1) L. R. 15 I.A. 97, 40 L. J. R., 15 Cal., 787.

that the matter was expressly decided by the High Court in the rent suit."

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As affording a good illustration of a material finding in a judgment which by reason of the decree in the suit could not operate as *res judicata* and of the effect of a decree as superseding a finding in a judgment, we may refer to the case of *Jamaitunnissa v. Lutfunnissa* (1). In that case the two questions which were referred to the Full Bench of this Court were:— (1) Whether the appeal to this Court on the part of the defendant Jamaitunnissa is maintainable? (2) Whether her objections under s. 561, Act No. XIV of 1882, in the Judge's Court were maintainable? It appears from the report that the plaintiff had brought in the Court of a Subordinate Judge a suit to obtain possession of certain property by right of inheritance to one Sikandar Ali Shah, then deceased, and to set aside a deed of endowment (*waqf-namah*) which the plaintiff alleged that the defendant had fraudulently induced Sikandar Ali Shah to execute. The Subordinate Judge found and held that the *waqf-namah* was not valid as against the plaintiff and could not interfere with the plaintiff's right of succession by inheritance, but, finding that the defendant was entitled to remain in possession of the property until a dower-debt due to her was satisfied, dismissed the plaintiff's suit without granting by his decree the relief which the plaintiff had claimed in his plaint as to the *waqf-namah*. The plaintiff appealed to the Court of the District Judge against the decree of the Subordinate Judge, and the defendant in that appeal filed objections under s. 561 of Act No. XIV of 1882 to the finding as to the *waqf-namah*. The District Judge dismissed the plaintiff's appeal, and, considering that the question as to the *waqf-namah* was not necessary to the disposal of the plaintiff's claim, refused to consider the question as to the *waqf-namah* and disallowed the objections which had been filed by the defendant. From that disallowance the defendant appealed to this Court. The majority of the full Bench, for reasons stated by them in their judgment, answered the two questions in the negative. The

(1) L. L. R., 7 All. 608.

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contrary view was entertained by Mahmood, J., and apparently by Oldfield, J. It appears to us that, whether the plaintiff in that suit was or was not entitled to the then present possession of the land, and although the defendant was entitled to the then present possession of the land in lieu of her dower-debt, the plaintiff, on the finding of the Subordinate Judge that the *waqf-namah* was not a valid deed which could interfere with the plaintiff's right of succession by inheritance to the grantor of that deed, was entitled to a decree setting that deed aside so far as it affected the plaintiff's interests, although his claim to the present possession of the land was dismissed. It may have been that on the finding that the defendant was entitled to the present possession in lieu of her dower-debt the finding of the Subordinate Judge as to the *waqf-namah* was in fact immaterial to her title to the then present possession, but that finding actually was material to one of the two reliefs claimed by the plaintiff. It also appears to us that the decree of the Subordinate Judge dismissing the plaintiff's suit was, as to the claim to have the *waqf-namah* set aside, at variance with the judgment, and that, if the finding as to the *waqf-namah* was correct, the plaintiff, and not the defendant, had a good appeal to the District Judge, as the relief claimed in the plaint as to the *waqf-namah* had not been granted by the decree. The relief as to the *waqf-namah* having been claimed in the plaint and not having been expressly granted by the decree, must, according to explanation III of s. 13 of Act No. XIV of 1882, be deemed to have been refused, and such refusal, notwithstanding the finding in the judgment that the *waqf-namah* was invalid as against and not binding on the plaintiff, would, by reason of s. 13, preclude the plaintiff from again alleging in any suit which the first Court was competent to try that the *waqf-namah* was not a valid deed binding upon him. In fact, having regard to the ground upon which that suit was dismissed, to the fact that the relief claimed in the plaint as to the *waqf-namah* was not granted by the decree, and to explanation III of s. 13 of Act No. XIV of 1882, all the issues, so far as the principle of *res judicata* as expressed in s. 13 was concerned, were finally decided by

the Court below in the defendant's favor, and she had nothing about which to appeal, and had no appeal by way of objection under s. 561 of Act No. XIV of 1882, or otherwise to the Court of the District Judge, and had no appeal from the decree of the District Judge to this Court. Explanation III of s. 13 of Act XIV of 1882, does not depend upon any finding of the Court in its judgment or upon the reasons of the Court for not granting the relief: it depends solely upon the fact that a relief claimed in the plaint was not expressly granted by the decree. By s. 2 of Act No. XIV of 1882, a "judgment means the statement given by the Judge of the grounds of a decree or order," and a "decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal....." It is obvious from the explanations to s. 13 of that Act that the decree which is the formal expression of the decision of the Judge may finally decide as between the parties matters which have not been set up as grounds of defence or attack.

Under such circumstances it appears to us that for findings to operate as *res judicata* they must have been findings upon which the decree or some operative part of it was made, and must have been findings which were necessary for the making of the decree in the way in which it or some operative part of it was made, and that it is the decree read in the light of such findings, and not the findings in the judgment apart from the decree, which finally, within the meaning of s. 13 of Act No. XIV of 1882, decides the matters in issue or which might and ought to have been in issue (Explanation II) between the parties in the suit. If the decree is inconsistent with the findings, the decree prevails over the findings which are inconsistent with it. For an extreme example, if a plaintiff sued for an instalment alleged to be due under a bond alleged to have been made by the defendant in the plaintiff's favor and the defendant pleaded that the bond had been forged by the plaintiff and was not the defendant's bond, and the Court, having found that the bond had been forged by the plaintiff and was not the defendant's

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bond, and there being no other issue, yet gave the plaintiff a decree for the instalment claimed, it appears to us that the finding that the bond had been forged by the plaintiff and was not the defendant's bond could not operate as *res judicata* in a future suit between the same parties on the bond, because the decree was inconsistent with the finding, and so far as the decree spoke for itself it decided that the defendant was liable upon the bond.

In *Ghela Ichkaram v. Sankalchand Jetka* (1), Sir Charles Sargent, C. J., and Fulton, J., held that when an issue is not necessary for the decision of a suit a decree couched in general terms does not cover the finding on that issue. With that negative proposition we entirely agree. But it is not clear to us that the converse affirmative proposition that a decree couched concluded in general terms covers every finding which is necessary for the decision of the suit is correct in all cases. For example, the finding of the principal Sudder Ameen in Bunwari Lall's suit upon the issue raised as to the validity of Bunwari Lall's adoption was a finding necessary *in limine* for the decision of the suit in the Court of the Principal Sudder Ameen, for if the validity of the adoption had not been established, Bunwari Lall had no legal right to ask for, and the Principal Sudder Ameen was not competent to express a decision on the validity of the patni lease, the plaintiff in that event having failed to prove that he had any interest affected by the lease, or any right to question its validity, and being on such finding an absolute stranger to all title necessary to support the suit. The decree of the Principal Sudder Ameen, dismissing Bunwari Lall's suit not having been based upon his finding that Bunwari Lall had been validly adopted, and having been made in spite of that finding, it would appear to follow from the passage which we have quoted from the judgment of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer*, that if there had been no appeal by Krishna Fehari Roy from the decree of the Principal Sudder Ameen, the finding as to the validity of the adoption of Bunwari Lall could not have operated as *res judicata*. It is obvious to us that their Lordships

(1) I. L. R., 18 Bom. 597.

of the Privy Council in *Krishna Behari Roy v. Brojeswari Chowd-ranee* (1) referred to the finding of the Principal Sudder Ameen only as one of the historical steps in the case leading up to the appeal to the High Court, and that when their Lordships said:—"There exists, therefore, a final and complete judgment upon the issue raised, either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit,"—they were referring to the decision of the High Court, which had dismissed Krishna Behari Roy's appeal, which was confined to the question of the validity of the adoption. The question as to whether Krishna Behari Roy had any right of appeal against the decree of the Principal Sudder Ameen, which had dismissed Bunwari Lall's suit without granting by it any declaration that the adoption was valid, does not appear to have been raised before their Lordships. From the passage which we have already quoted from the judgment of their Lordships in *Rajah Run Bahadoor Singh v. Musummet Lachoo Koer* (2), it may be inferred that if objection had been taken that Krishna Behari Roy had no right of appeal from the decree of the Principal Sudder Ameen, their Lordships would have held that he had no such right, as he could have supported the decree of the Principal Sudder Ameen dismissing Bunwari Lall's suit on the ground that the Principal Sudder Ameen ought to have decided the question of the adoption in his, Krishna Behari Roy's, favor.

That a finding on an issue raising the question of the plaintiff's title may be necessary to the decision of the suit, and yet under some peculiar circumstances may not operate as *res judicata* on that question of title, although the decree could not have been made as it was made so as to be a good decree unless the issue as to the plaintiff's title had been found as it was found, may be inferred from the decision of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh v. Musummet Lachoo Koer* (1). In that case their Lordships held on two grounds that the finding of the Civil Court on the question of separation did not operate in the subsequent

(1) L. R., 2 I. A. 283.

(2) L. R. 12 I. A. 23 at p. 34.

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suit as *res judicata*, the first ground being apparently that the Rent Court which tried the first suit was not a Court of jurisdiction competent to try the subsequent suit. The second ground of their Lordships' decision we shall give in their own words, as it depended to some extent upon matters which are not otherwise explained in the report of the case in L. R. 12 I. A. 23. The second ground was as follows:—"Having regard, however, to the subject-matter of the suit, to the form of the issue (which has been above set out) and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any, and what, rent was due from the tenant, and that on this ground also the judgment was not conclusive." It is obvious from the issue as to separation which is set out at p. 34 of L. R. 12 I. A., and from the fact that Run Bahadoor had intervened in the rent suit alleging that he and his deceased brother, whose widow the plaintiff in the rent suit was, had been joint members of the Hindu family, that a finding that the brothers had been joint and had not separated would have been fatal to the widow's suit in the Rent Court, and in that sense the issue as to separation was necessary to the decision of the rent suit. In the rent suit the widow in fact obtained her decree for the rent.

The result appears to us to be that a finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata*, need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found

as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can in our opinion operate as *res judicata*. For example, if A, alleging himself to be the legal representative of B, deceased, sues C for breach of a contract which A alleges was made between B and C on the 1st of January 1890, and C pleads that A is not the legal representative of B, and further that the contract was not one binding upon a minor, and that he, C, was at the date of the contract a minor; and the Court finds that A is not the legal representative of B, and that C on the 1st January 1890, was a minor, and that the contract was one which by reason of his minority when it was made was not binding on him, and makes a decree dismissing the plaintiff's suit, it appears to us that of those two findings that which would operate as *res judicata* between the parties was the finding that A was not the legal representative of B, because, until A had established his title to sue upon the contract as the legal representative of B, the defendant C could not be put to proof of his minority on the 1st of January 1890, and on the finding that A was not the legal representative of B, it became and was immaterial whether C was or was not a minor on the 1st of January 1890. In our opinion a matter cannot be said to be "directly and substantially in issue," within the meaning of the first paragraph of s. 13, Act No. XIV of 1882, unless and until it is or becomes material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to the Court to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue," within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be

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desirable, as was pointed out in *Tarakant Banerji v. Puddomoney Dasse* (1) and in *Devarakonda Narasamma v. Devarakonda Kanaya* (2), that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

Issues, as pointed out by James, L. J., in *Robinson v. Duleep Singh* (3) "are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right. If it were otherwise, a decision of a Court upon a matter as to which an issue had been framed might operate under s. 13 as *res judicata*, if the finding was not at variance with the decree, although the issue and the matter in dispute to which it referred were or became absolutely immaterial to the decision of the suit; and although the decree would have been a good decree in law on the material facts found, no matter how the issue as to that immaterial matter in dispute had been found. If the above view be correct, the finding of the Munsif that Rs. 188-7-4 was due upon the bond which was relied upon as *res judicata* in *Mohan Lal v. Ram Dial* (4) did not operate as *res judicata quâ* the precise amount due at the time when the suit for the return of the bond was instituted, although it did operate as *res judicata* on the simple question upon which the right to a decree in the suit depended, namely, whether at the time when that suit was instituted the debt for which the bond had been given was or was not discharged.

Applying the conclusion at which we have arrived to this case, the finding in the judgment of the Munsif in the previous suit as to the plaintiff's title could not operate in this or in any future suit as *res judicata*, as the decree of the Munsif dismissing the plaintiff's suit, which was for a declaration of his title, was made on another and different ground, that ground being that the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877) applied, as the plaintiff in that suit for a declaration of title was not in possession and was consequently in a position to seek in that suit the further relief of a decree for possession, which he had not claimed.

(1) 5 W. R., p. c. 63.

(2) I. L. R., 4 Mad. 134.

(3) L. R., 11 Ch. D. 798, at p. 813.

(4) I. L. R., 2 All., 843.

On the finding of the Munsif that the plaintiff was not in possession the proviso to s. 42 of the Specific Relief Act, 1877, (Act No. I of 1877) applied, and on its application the Munsif was not in our opinion competent to try the question of title, as the statute law prohibited him from giving effect by declaration to any finding that the plaintiff was entitled to the property. It is obvious that, had the Munsif inserted in his decree that finding as to the plaintiff's title, he would have been acting in violation of the proviso to s. 42 of Act No. I of 1877. The finding as to the plaintiff's title in the previous suit, as it could have resulted in no relief being granted to him in that suit, was immaterial, and it certainly was, in any point of view, under the circumstances unnecessary to the decision of that suit. Even if the decision of the Full Bench in *Niamut Khan v. Phadu Buldia* (1) were correct in its application in the particular case before the Calcutta Full Bench, it could not be applied in this case before us, because the insertion in the decree in the first suit of a finding that the plaintiff had established his title would have been a declaration that he had the title which he claimed. Similarly no declaration of title could be made in a suit dismissed under s. 4 of the Indian Limitation Act, 1877 (Act No. XV of 1877), as a Court has no power in a suit barred by limitation to do otherwise than dismiss the suit on that ground. In our opinion in a suit, as, for example, that of Bunwari Lall against the patnidar, in which in order to try the other issue between the parties, it is first necessary to ascertain the title, the right or the status of a party, and a finding is expressed in the judgment upon an issue as to such title, right or status in favor of one party, but the suit is disposed of in favor of the other party by a decree on findings on other issues, the decree is not in conformity with the judgment unless it contains a declaration of such title, right or status in accordance with the finding in the judgment on that issue, provided that the statute law does not limit the form of decree to be made in the particular case, or prohibit the Court from making a declaration in the circumstances of the case.

(1) I. L. R., 6 Calc., 319.

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If the practice which in our opinion is the correct practice were followed in the preparation of decrees, most of these difficult questions as to the application of s. 13 of Act No. XIV of 1882 could not arise. We may further say on this subject that in our opinion when the decree is wholly in favor of the party in whose favor the finding as to the title, right or status is, such a declaration, unless expressly asked for, is unnecessary, as the decree in such a party's favor necessarily implies that the question of title, right or status was decided in his favor. That seems to follow from a consideration of explanation II of s. 13 of Act No. XIV of 1882. For example, if Bunwari Lal's suit against the patnidar had been decreed, the necessary implication would have been that he had been validly adopted. Similarly, if Shaikh Enaetollah's first suit had been decreed, the decree for the enhanced rent would necessarily have implied that the tenure was one which allowed of the rent being enhanced and that the other circumstances existed which entitled the landlord to a decree for enhanced rent.

The result is that we allow this appeal and set aside the order of this Court with costs, and dismiss with costs the appeal to this Court, and restore and affirm the decree of the District Judge.

Appeal decreed.

PRIVY COUNCIL.

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BETI MAHARANI (PLAINTIFF) v. THE COLLECTOR OF ETÁWAH
(DEFENDANT).

On appeal from the High Court at Allahabad.

Limitation—Act XV of 1877, ss. 15 and 19—Attachment of debt by third party—Civil Procedure Code, ss. 268, 485 and 486—Attachment not prohibitory of suit by creditor against debtor—Acknowledgment of debt—Sarbarakar's powers.

An attachment before judgment under s. 485, Civil Procedure, issued by a Court at the instance of a third party, prohibited the creditor from recovering, and the debtor from paying, the debt:—*Held*, that an order in those terms was not an order

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staying the institution of a suit within the meaning of s. 15 of the Limitation Act, No. XV of 1877.

Shib Singh v. Sita Ram (1) referred to and approved,—the same rule relating to all attachments whether before or after judgment, couched in similar terms. The person restrained from receiving payment may, nevertheless, assert his right in a suit for the money due.

A debtor, since deceased, had executed a bond to his creditor. The heir of the debtor having been disqualified, and a sarbarakar of the estate having been appointed, the latter had executed a *mukhtarnamah* or power of attorney empowering an agent to act in reference to the land, and the charges thereon. The agent admitted the debt:—

Held, that, on the construction of the power given to him, authority to the agent to acknowledge a personal liability of the debtor and his heir, within the meaning of s. 19 of Act No. XV of 1877, could not be implied.

It was doubted whether the sarbarakar, not having been appointed guardian of the heir, could have made such an acknowledgment herself.

Another acknowledgment, a notice from the Collector, as agent for the Court of Wards, admitting the estate's indebtedness to the original holder of the bond, was relied upon. In addition to the bond-debt now in suit, another sum, due on a mortgage, was claimed by the same creditor, and the terms of the notice would apply to either:—

Held, that, the debt referred to in the notice not having been identified with the bond-debt in suit, acknowledgment of the latter by the Collector was not established within s. 19.

The oral evidence of the Collector as to his intention was not admissible to construe the notice, but accompanying circumstances might be shown and considered.

APPEAL from a decree (2) (19th February 1892) of the High Court reversing a decree (8th April 1889) of the Subordinate Judge of the Mainpuri district.

The plaintiff-appellant held, by assignment on the 7th March 1887, a registered bond for Rs. 7,000, and interest, executed on the 20th June 1876 by the late Lala Laik Singh, a zamindar owning the taluka Harchandpur in the Etawah district, in favor of the firm of Gopalji, Kishen Das; the bond was payable on the 1st November 1876. Laik Singh died shortly after that date, and his widow also. His nephew Pirthi Singh was his heir, but

(1) I. L. R., 13 All., 76. (2) I. L. R., 14 All., 162.

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being of unsound mind was declared disqualified; and his wife, Raj Kuar, was appointed by the Collector of the district to be sarbarakar of the estate, remaining in that capacity till her husband's death in 1887. She was not appointed his guardian under Act XXXV of 1858. After succeeding to the estate Raj Kuar petitioned, on the 10th April 1888, that it should be taken under the charge of the Court of Wards (s. 194, Act XIX of 1873) and this was done. Whilst acting as sarbarakar, she, on the 12th February 1880, executed a mukhtarnamah or power of attorney, reciting that land was in her possession as manager for her husband as well as in her own right, and appointing Ajudhia Prasad, and three other persons, to be her am-mukhtars, to whom she gave the following powers:—

“The said mukhtars may on the authority of this general power of attorney make assessment and realization of revenue, and write out sarkas and pottas and have them registered, and institute in any of the Courts of the said districts cases for arrears of rent, or cases relating to dealings, or firms, or indigo factories, &c., or institute criminal cases, or present appeals or applications for review of judgment in the competent Court, or put down verification endorsement on any petition or application under their own signatures, or with their hand put down signature on my behalf, or appoint any one as pleader or mukhtar in any case and in any Court, or constitute themselves mukhtars for any particular case, or themselves put questions and give replies, orally or in writing, in Court, or themselves conduct the defence of any case, or themselves take objection in any case, or present any miscellaneous petitions in any Court, or in any case cause depositions to be taken down and put down their signatures, or obtain copies of judgments, decrees and other papers from Court, or take back documents from Courts, or realise moneys due to me from Court or any other person on receipts signed by them, or deposit in Court on my behalf money payable to others, or by taking out execution effect attachment and sale, or after effecting on their own authority attachment as against defaulting cultivators, apply to the Court for sale, or accept any compromise or arbitration in

any case, or cause any joint village to be partitioned by any arbitration or Court, or take possession of any property, or bring about dispossession of any person, or institute suits for the determination, abatement or enhancement of rent, or take in Court any proceedings under the laws in force for the time being in respect of the zamindari, dealings, and trade firms, or carry out any orders of the Court and put down signatures or give the lease of my zamindari villages to any person and take the zar-peshgi (money in advances, on receipt signed by them, or take for me lease by hypothecating my property, or purchase at private or auction-sale any new property for me, or present in a competent Court any application for, and obtain certificate of, sarbarahkari or inheritance in respect of any property in my name, or obtain the permission of the District Judge to contract fresh debts on the security of my property for paying off the old debts of my ancestors Lala Laik Singh and Thakurani Amrai Kuar, and in accordance therewith write documents on my behalf, and after my signature present it in the office of the Registrar or Sub-Registrar for registration, and after verifying its contents put down their own signatures, and themselves take any amount of the cash that may be fixed in regard to the document in the presence of the Registrar or Sub-Registrar, or they may, for the purpose of extending the period of repayment of old debts or reducing the interest, renew any document executed by the aforesaid ancestors by hypothecation of my property, and after obtaining my signature have it registered and verify its contents, and put down their signatures at the time of registration, or for the purposes of my business take loan up to Rs. 1,000 as a parol debt from any person, or institute suits in Court for the debts due to me, or Lala Laik Singh, or his deceased wife, or take out execution of the decrees of the time of the Lala Sahib or Thakurani Sahib and realise the money on giving them receipts, or sue the karindas of my ilakas for rendition of accounts, or dismiss any servant for his unfitness or in view of economy. All this, if done by the said mukhtars, is, and hereafter shall be, accepted and satisfied by me as done by myself. I have therefore executed this by way of a general power of attorney that it may serve as evidence and be of use when needed. Dated 12th February 1880."

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The plaint on the 6th of November 1888 claimed, besides the principal, interest amounting to Rs. 15,365 from the agent of the Court of Wards, joining Thakurani Raj Kuar as a defendant, and stated that Ajudhia Prasad, mukhtar-am of the estate, had acknowledged the debt on the 14th of October 1882; relying also on an acknowledgment in a notice from the Collector in April 1888. It also declared that, on the 17th of May 1881, the debt had been attached by prohibitory order whereby part of the time that had elapsed had been excluded from calculation in the period of limitation.

The Collector of Etáwah, as agent of the Court of Wards, depended on the six years' bar; and issues were fixed as to three principal points: first, whether Ajudhia Prasad had been competent to acknowledge as authorized agent; secondly, whether the Collector's notice contained an acknowledgment; thirdly, as to the effect of the attachment.

The attachment was issued on the 17th of May 1881 in a suit which Rani Kishori, a creditor of Gopalji, Kishen Das, brought against that firm. At that time the bond was said to be in the possession of Sah Kirpa Ram, another creditor, who sued both the firm and the Rani. To obviate a risk of loss of the bond by limitation, an order was made by the Mainpuri Court, summoning Ajudhia Prasad, as mukhtar-am of Raj Kuar, and on the 14th October 1882 the following was recorded:—

“The witness, on looking at a bond executed by Laik Singh, dated 20th June, 1876, for Rs. 7,000, in favor of Gopalji, Kishen Das, stated:—‘This document is correct and the lady with whom I am employed is liable. By looking into the accounts it will be ascertained as to what sum of money is due under this bond on account of the balance; and whatever sum may be found due under the bond in accordance with a proper account, the lady with whom I am employed is liable for the same. She is liable as the heir of Laik Singh.’”

The Subordinate Judge, in his judgment in this suit, considered that on the construction of the mukhtarnamah of the 12th of Feb-

ruary 1880, Ajudhia Prasad was not a duly authorized agent of the sarbarakar within the meaning of section 19, explanation 2. This was not reversed by the High Court; and the first of the above issues was found against the plaintiff. As to the second of them, the Courts below differed. The point on which they differed was whether, there being two distinct debts due to Gopalji, Kishen Das, from the estate, one on a mortgage bond, and the other on the bond now in suit, the notice given by the Collector had been shown to relate to the latter. The first Court held that the Collector, exercising the powers of the Court of Wards, had made an acknowledgment, as he could (the Court citing *Kamla Kuar v. Har Sahai*) (1), and that his notice related to both the debts.

The High Court, on the other hand, decided that there had been no acknowledgment by the Collector of liability on the part of the estate for this debt in particular. The Judges (STRAIGHT and TYRBELL, JJ.), referred to the oral explanation by the Collector which was on the record, and to the surrounding circumstances; and held that there was no acknowledgment by him in the sense of section 19.

On the third of the above points the Courts also differed. The Subordinate Judge, following *Shunmugam v. Moidin* (2), was of opinion that limitation should not be taken to have run whilst the order of attachment of 1881 was in force. His conclusion was that the suit was brought within time; and he decreed the claim. The High Court differed from the Madras High Court as to the effect of an attachment, and following the decision in *Shib Singh v. Sita Ram* (3) held that the attachment of 1881 had not prohibited a suit for the debt. Accordingly the decree of the first Court was reversed, and the suit was dismissed as barred by limitation. The judgment of the High Court is reported in I. L. R., 14 All., 162.

On this appeal—

Mr. H. A. Giffard, Q.C., and Mr. H. Cowell, for the appellant, argued that the suit was not barred by limitation, and that the

(1) Weekly Notes 1888, 187.

(2) I. L. R., 8 Mad., 229.

(3) I. L. R., 13 All., 76.

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judgment of the High Court should be reversed. The notice issued in April 1882 to Gopalji, Kishen Das was within the period of limitation, and operated under section 19. The time of the continuance of the attachment should be excluded, and on this point the Subordinate Judge had rightly followed the decision of the Madras High Court. The effect of the Collector's notice of April 1882 was to admit indebtedness. It imported a promise to pay the amount that might be found to be due on the accounts being taken; and to deal with this as an acknowledgment accorded with the principle acted upon in English cases. They referred to *Quincey v. Sharpe* (1). At the same time reliance was placed on Ajudhia's acknowledgment in October 1882 as giving a fresh starting point for limitation. Should that acknowledgment be found wanting in any essential point, at all events the suspension of the running of limitation whilst the attachment issued in *Rani Kishori v. Gopalji, Kishen Das* was upon the debt came in aid of the appellant under section 15. With regard to Ajudhia, the acknowledgment in his statement should be held equivalent to one that might have been made to the same effect by Raj Kuar herself, as it was within the scope of his authority under the power of attorney executed by her in 1880 as sarbarakar. She obtained time by means of Ajudhia's representation, and could not disavow her agent's statement. Also the terms of the power given to him, if they did not directly authorize acknowledgment in so many words, authorized him to enter into compromises and to do other acts, which included the exercise of the authority in question. Again, in reference to the attachment of 1881, the decision in *Shunmugam v. Moidin* (2) was referred to, and it was submitted that it was correct; not so, that in *Shib Singh v. Sita Ram* (3). Lastly, it was argued that if such an order as was prescribed by Form No. 162 in the schedule of the Code of Civil Procedure was not within the meaning of section 15, then there was no kind of order other than that in an injunction to which section 15 could relate. Unless the order in that form was within section 15, the word "order" in that section would be unmeaning. But the

(1) L. R., 1 Exch. D. 72.

(2) I. L. R., 8 Mad., 229.

(3) I. L. R., 13 All., 76.

words were "injunction or order," and they should receive their full meaning. An "injunction" was issued upon a party to a suit, but "orders" were made upon others as well. For the creditor to bring a suit, unless special measures were taken, must result in there being conflicting orders as to the disposal of the same debt, and thus, it was submitted, the order of attachment would be infringed if the suit were brought whilst that order was in force.

Mr. *A. Cohen, Q.C.*, and Mr. *J. H. A. Branson*, for the Collector of Etáwah, argued that the decree below was right. The suit was barred by time. Their principal argument was that the notice issued by the Collector in 1888 was not an acknowledgment of liability valid for the purposes of section 19, which required that the acknowledgment should be fixed upon some property or right. *Ajudhia's* acknowledgement of 1882 had been rightly dealt with as insufficiently authorized in the judgment of the Court of first instance. At the same time, the suspension of limitation claimed to have been caused by the issue of the attachment could not be allowed for the reasons given in *Shib Singh v. Sita Ram* (1), which had been rightly decided. With regard, then, to the Collector's notice, the argument was that the evidence showed that the Collector had received information that two separate debts were claimed as due from the estate to *Gopalji, Kishen Das, viz.*, the debt now in suit, and another debt secured by a mortgage-bond. The Collector's notice did not refer in terms to the debt now sued for, nor did it necessarily refer to both the debts. On the contrary, its terms were fully satisfied by its being held to refer to the mortgage-debt alone. Reference was made to *Dharma Vithal v. Govind Sadvalkar* (2). It was not apparent on the notice that it was intended to be an admission of the debt now in suit, but it appeared to be a notice to creditors to bring in claims. They referred to *Scott v. Jones* (3), *Warburton v. Stephens* (4), *In re River Steamer Company* (5), *Everett v. Robertson* (6), *Ex parte Topping* (7), *Leake on Contracts*, 865, part IV, c. 11.

(1) I. L. R., 13 All., 76.

(4) L. R., 43 Ch., Div., 39.

(2) I. L. R., 8 Bom., 99, 102.

(5) L. R., 6 Ch., Ap., Cn., 822.

(3) 4, Cl. & Fin., 382.

(6) I. E. & E. 16; 28, L. J., Q. B., 23.

(7) 34, L. J., Bank., 44; 4, D. G. J. & S. 551.

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Mr. *H. A. Giffard*, Q.O., replied.

Afterwards, on the 15th December 1894, their Lordships' judgment was delivered by LORD HOBHOUSE.

This appeal raises questions under the Indian Limitation Act, 1877. The suit is brought on a bond for Rs. 7,000 executed on the 20th June 1876 by Lala Laik Singh, whose estate is now under the management of the Court of Wards, in favour of the firm of Gopalji, Kishen Das. The plaintiff, who is now appellant, is assignee of the bond. The defendant, the Collector of Etáwah, represents the Court of Wards.

The debt was made payable on the 1st November 1876. Nothing has been paid on it. The suit was brought on the 6th November 1888, more than 12 years after the date of payment. The term of limitation is six years; so that the plaintiff has to prove circumstances which interfere with this running of time. Those circumstances are three in number:—First, an acknowledgment of the debt made by one Ajudhia Prasad on the 14th October 1882; secondly, a notice given by the Deputy Collector of Etáwah in April 1888; thirdly, an order made by the Subordinate Judge of Mainpuri on 17th May 1881 for attachment of the bond, which remained in force till 7th March 1887. If there has been a valid acknowledgment by Ajudhia, and also by the Court of Wards, as contended, the right of suit is saved; or if the attachment prevented the running of time, and there has been either acknowledgment by Ajudhia or by the Court of Wards, there is the same result. But unless the plaintiff can establish one of those combinations of events the suit is barred.

When Ajudhia made acknowledgment the position of affairs was as follows:—Laik the bond-debtor died without issue, leaving a widow, on whose death his nephew Pirthi succeeded to his estate. Pirthi became incompetent to manage his property, and his wife Raj Kuar was appointed by the Collector to be sarbarahkar or manager. She never was his guardian. In February 1880 she executed a general power of attorney to Ajudhia. The order of attachment was granted in the suit of one Rani Kishori, a creditor of the firm of bondholders. After this, and apparently with an eye to

the running of time, Ajudhia was summoned and examined by the Court.

His deposition is a clear acknowledgment of the liability of Laik. He identifies the bond in suit and another, and adds—"I consider my master Laik Singh to be the debtor." Perhaps that may properly be taken in the plaintiff's favour, as meaning that the debt was due from Laik's assets or from his heir. But then arises the question whether he was "an agent duly authorized in that behalf" within the meaning of section 19 of the Limitation Act. The Subordinate Judge decided that he was not. In the High Court Mr. Justice Tyrrell took the same view, and Mr. Justice Straight inclined to the contrary view. At that time Pirthi was liable to answer the bond to the extent of Laik's assets, but it was a personal debt of Laik, not specifically charged on his estate, which could only be made liable by suit. The question then is, first, whether Raj Kuar herself was an agent duly authorized to acknowledge Pirthi's liability; and secondly, whether Ajudhia was so authorized.

The office of sarbarahkar has regard, as their Lordships understand, to the lands with which the Collector is concerned, and not to the person or the personal property of the landholder. If so, it is difficult to see how a sarbarahkar, not being guardian, can be authorised to admit a personal liability. The point has not been carefully inquired into, and in the absence of accurate knowledge their Lordships will only say that Raj Kuar's authority seems very doubtful. But they think it clear that, supposing she had it, she did not delegate it to Ajudhia. Her expressed objects had reference to the lands of her husband, of which she was the sarbarahkar, and to other lands of which she was herself the proprietress. "Therefore," she says, "as regards the entire property possessed by me and my husband for the present and future, in my present capacity, and in such capacity as I may possess hereafter," she appoints four persons, of whom Ajudhia is one, to be general attorneys. Then she specifies a number of things that they may do. The Subordinate Judge has subjected the instrument to a very careful examination for the purpose of showing the scope of their powers. Every

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one of them may be referred, and indeed most readily refers, to the lands of Pirthi and Raj Kuar. There is a power to obtain the permission of the District Judge to contract fresh debts "on the security of any property" for the purpose of paying off old debts of Laik; and again a power to renew documents of hypothecation for the purpose of extending the period of repayment. Both these powers have reference to charges on land; and in both cases the attorneys are to prepare documents for Raj Kuar's own signature prior to registration. Their Lordships agree with the decision below that the document does not contemplate such an act as an acknowledgment of Pirthi's personal liability; and they need not examine the further question whether the fact which Ajudhia states in his deposition, that Pirthi had then regained his capacity, affects the authority given by Raj Kuar.

Their Lordships now pass to the notice given by the Court of Wards, which is as follows:—

"Whereas the 'riasat' of Harchandpur, tahsil Phaphund, is "under the management of the Court of Wards, and it has been "ascertained that money is due to you by the 'raises' of Harchandpur, therefore notice is hereby given to you to attend either in "person or through a mukhtar at the Collector's office at Etawah "in my Court on 17th April 1888, at 10 A.M., together with the "deeds relating to the accounts, and you will be questioned about the "debt."

It was issued between the 12th and 17th of April 1888. At that time Pirthi was dead and Raj Kuar was his heir. Raj Kuar was desirous of being declared disqualified and of putting her estate under the management of the Court of Wards. Her first application seems to have been made on the 10th April, and the Court must have acted immediately without waiting for formal orders, which were not issued till a later time. But it must be taken that the Court's act would bind the ward Raj Kuar and that the notice is the act of the Court. The question is whether, supposing the bond to be still alive, it acknowledges liability on that bond.

The notice is certainly a very imprudent one. Though it ends by saying that the creditor will be questioned about the debt, it begins by saying that it has been ascertained that money is due from the "raises" of Harchandpur; and if that statement can be applied to any particular debt it is an acknowledgment of liability to pay whatever may be found due on account of that debt. How then does the plaintiff show that the notice applies to the bond in suit? It is not addressed to the plaintiff but to Kishen Das. But there were two bond-debts claimed by Kishen Das. One is the bond in suit, and the other is a mortgage-bond for Rs. 14,000 executed on the 25th January 1875. Their Lordships cannot follow the learned Judges of the High Court in admitting the Collector to give oral evidence of his intentions for the purpose of construing the notice. But they may for that purpose properly look at the surrounding circumstances. Indeed it is only by reference to extrinsic facts that the general words of the notice can be applied to any specific subject. If it were found that there was no other account between Kishen Das and the "raises" of Harchandpur than that of the bond in suit, the notice would clearly fasten on the bond in suit. But there have been produced certain papers from the Collector's office, at the instance of both parties to the suit. One is a list of creditors up to April 1888. Another is a report dated the 13th April 1888 forwarded by the Tahsildar to the Collector with another list of creditors made up to June 1886 and stated to have been filed with some record of that year. Each of these three documents exhibits both bonds, draws the distinction between the simple bond and the mortgage-bond, and states that the former is barred. In this state of facts it is impossible for the plaintiff to contend that the general words of the notice are not satisfied by reference to the mortgage-bond, or that they constitute an acknowledgment of liability in respect of the property or right sued for, as is required by section 19 of the Limitation Act.

The two foregoing points being decided against the plaintiff, the suit would be barred by time even if the period covered by the prohibitory order were excluded. But that question is just as much

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in issue as the two others, and has been argued quite as carefully ; and it must apply to so many cases that their Lordships think it better to express the conclusions at which they have been able to arrive.

Section 15 of the Limitation Act of 1877 runs as follows :—

“In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it is issued or made, and the day on which it was withdrawn, shall be excluded.”

As above mentioned, the order in question was issued before decree in the suit of Rani Kishori against Kishen Das. There is no copy of it in the record, which is very unfortunate because the present point turns upon its terms ; but it is admitted by the defendant's written statement to have been issued, to have been in force from the 17th of May 1881 to the 7th of March 1887, and to prohibit payment of the bond in suit. It was doubtless in one of the forms contemplated by those sections of the Civil Procedure Code which relate to attachments. The order is said by the High Court to have been made under section 485 of the Code, and the form given for such an order is No. 161. That only directs the bailiff of the Court to attach the property of the defendant, and to report to the Court how he has executed the warrant. Their Lordships cannot find any form which exactly fits this case. Perhaps the order followed Form 139 which applies to attachments after decree, or Form 162 which applies to property in the possession of somebody who claims a lien on it. Each requires some supplement to make it altogether intelligible, but the prohibition effected by each is in accordance with the defendant's admission ; that is to say the defendant is restrained from receiving, and the person liable to him from paying or delivering to him or to any one else.

An order in those terms is not an order staying the institution of a suit. There would be no violation of it until the restrained creditor came to receive his debt from the restrained debtor. And

the institution of a suit might for more than one reason be a very proper proceeding on the part of the restrained creditor, as for example in this case, to avoid the bar by time, though it might also be prudent to let the Court which had issued the order know what he was about. Their Lordships think that the High Court have taken the correct view of this matter. In the case of *Shib Singh v. Sita Ram* (1), the defendant pleaded in bar to a suit that the plaintiff was prohibited by an order of this kind, but the plea was overruled. In the present case Mr. Justice Straight says: "What I understand section 268 to mean is, that the debt is not to be realized by the judgment-debtor, who is a creditor of some third party, and not that he is to refrain from, in the ordinary course of law, putting his claim into Court, and asserting his right to such money as may be due to him." Section 268 relates to attachment after decree, but the same rule must apply to all attachments couched in similar terms.

The result is that their Lordships agree with the conclusions of the High Court, and will humbly advise Her Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. Ranken, Ford, Ford and Chester.*

Solicitor for the respondent:—*The Solicitor, India Office.*

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and Mr. Justice Knox.

REFERENCE UNDER ACT NO. 1 OF 1879 (INDIAN STAMP ACT), s. 49.

Act No. 1 of 1879 (*Indian Stamp Act*), s. 3, sub-s. (4), cl. (b)—Stamp—Bond—Promissory note.

Held that a document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest was not "attested by a witness" within the meaning of cl. (b) of sub-s. 4 of s. 3 of Act No. 1 of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document that the document was correct and was written by his pen.

(1) I. L. R., 13 All. 76.

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REFERENCE
UNDER ACT
No. I of 1879.

THIS was a reference under s. 49 of Act No. I of 1879, made through the District Judge of Rae Bareilly by the Munsif of Partágarh of the question whether a certain document should or should not be stamped as a bond within the meaning of cl. (b), sub-s. (4) of s. 3 of Act No. I of 1879.

The terms of the document were as follows:—"To Swasti Sri Sahu Ram Adhin Nandu, resident of village Bachhla, taluqa Patti Saifabad, pargana Belkher, tahsil Patti, district Partágarh. (who tenders his) greeting (Ram Ram) to him. May God bless you. Further, I execute a promissory note (*rukka*) for Rs. 31-5-6 on account of the balance of my account which I promise to pay without any plea and objection on Aghan Badi 15th, 1296F., adding interest at Re. 1 per cent. and will make no objection.

Written on Miti Magh Sudi 2nd, 1295F., with the pen of Jamna Lal (of) Ram Ganj.

Signed (*Alabd.*).

Signature of Ramman, Ahir.

The promissory note (*rukka*) written is correct.

Rs. 31-5-6 taken is correct; with the pen of Jamna Lal (of) Ram Ganj.

The mark made by Ramman is apparent."

On this reference the Court (EDGE, C. J., MAHMOOD and KNOX, JJ.) made the following order:—

The case reported in I. L. R., 10 Mad. 158, does not apply to the facts of this case. The document in this case is not in our opinion "attested by a witness" within the meaning of cl. (b) of sub-s. (4) of s. 3 of Act No. I of 1879. What is said to be an attestation is merely a statement in writing by the scribe of the document that the document was correct and was written by his pen. We therefore answer the question referred to us by saying that the document in question cannot be treated as a bond as defined in cl. (b) of sub-s. (4) of s. 3 of Act No. I of 1879.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

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June 2.

WAJID ALI SHAH (PETITIONER) v. NAWAL KISHORE (OPPOSITE PARTY).*

Civil Procedure Code, ss. 623, 625, 541—Review of judgment—Application for review not to be accompanied by copy of judgment, decree or order sought to be reviewed—Act No. XV of 1877 (Indian Limitation Act), s. 12.

It is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed.

THIS was a reference to the Full Bench made by Edge, C. J., and Aikman, J., of the question whether an application for review must necessarily be accompanied by a copy of the decree or order, and, unless the Court dispenses with it, by a copy of the judgment sought to be reviewed.

A second appeal (No. 575 of 1891) had been dismissed by the High Court on a point of limitation, and on the appellant (petitioner) applying for review of the judgment dismissing his appeal, the vakil for the respondent took objection that the application for review was not accompanied by a copy of the decree or of the judgment against which review was sought, one at least of which, he contended, was required by s. 625 read with s. 541 of the Code of Civil Procedure, and impliedly by s. 12 of the Indian Limitation Act, 1877. Hence the reference as above stated.

Mr. J. Simeon, for the petitioner.

Pandit Baldeo Ram Dave, for the opposite party.

EDGE, C. J.—The question which has been referred to the Full Bench in this case is :—Is it necessary to the validity of an application for the review of a judgment under s. 623 of the Code of Civil Procedure that the application should be accompanied by a copy of the decree or order to which it relates, and by a copy of the judgment, unless the Court dispenses therewith? The section upon which it is contended that an application for the review of a judgment must be accompanied by a copy of the decree or order, and, unless the Court dispenses with it, by a copy of the judgment is s. 625 of the

*Miscellaneous application in Second Appeal No. 575 of 1891.

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Code of Civil Procedure. That section is as follows:—"The rules hereinbefore contained as to the form of making appeals shall apply *mutatis mutandis* to applications for review." It is contended that the words "form of making appeals" as used in that section mean the manner of making appeals, and that "the form" in s. 625 is not restricted to the sense in which the word "form" is used in s. 541 of the Code of Civil Procedure. In the first paragraph of s. 541 it is enacted that—"the appeal shall be made in the form of a memorandum in writing presented by the appellant and shall be accompanied by a copy of the decree appealed against, and (unless the appellate Court dispenses therewith) of the judgment on which it is founded."

The contention to which we have been referring has been supported by references to certain decisions anterior in point of date to the coming into force of Act No. VIII of 1859, by a reference to the Rules of the High Court of Calcutta, by a reference to the decision of Mr. Justice Marriott in *Adarji Edulji Golakhana v. Manikji Edulji*, (1) as to which it may be remarked that the learned Judge gave no reasons for his judgment, and by a reference to s. 12 of Act No. XV of 1877.

It appears to me that if the Legislature had intended that an application for a review of judgment should not merely be in the form of a memorandum setting forth concisely and under distinct heads the grounds of the application, but should be accompanied by a copy of the decree or order, or of the judgment the Legislature would have said so in express terms. It also appears to me that, grammatically regarded, s. 625 has the same meaning as if it had been drafted as follows:—"The rules hereinbefore contained as to the form in which appeals may be made shall apply *mutatis mutandis* to applications for review." The form of making appeals mentioned in s. 625 in my opinion means the form in which appeals may be made, and consequently, if we look back to s. 541, we find that the appeal should be made in the form of a memorandum in writing presented by the appellant. The documents which must by

(1) I. L. R. 4 Bom., 414.

law accompany the memorandum in writing are not included in the form in which an appeal is to be made, as can plainly be seen from an ordinary reading of s. 541. That section prescribes the form in which an appeal should be made, and enacts that the appeal shall be accompanied by certain documents.

If the question depended solely on a construction and comparison of ss. 625 and 541 of the Code of Civil Procedure, I would have had no doubt that all which was required by s. 625 was the presentation of a memorandum in writing by the applicant containing particulars similar to those required in the case of a memorandum of appeal. My doubt, and I believe that of some of my brother Judges, has not been caused by anything to be found in the Code of Civil Procedure, but by a section contained in a separate Act, I refer to s. 12 of Act No. XX of 1877. *Mr. Baldeo Ram's* able argument based on s. 12 of Act No. XV of 1877 considerably impressed me. His argument was that as that section enacted that the time requisite for obtaining a copy of the decree or order and a copy of the judgment should be excluded from the period of limitation prescribed for an appeal or for an application for review of judgment, the inference was that such copies were equally necessary for the purpose of making an application for a review of judgment as for the purpose of presenting an appeal. It appears to me, however, that if we are to construe s. 625 of the Code of Civil Procedure by the second and third paragraphs of s. 12 of Act No. XV of 1877, we would have to put a similar construction on some section or other in Chapter XXXVII of the Code of Civil Procedure and hold that where an application to set aside an award is made it would necessarily follow from the fourth paragraph of s. 12 of Act No. XV of 1877 that with the application to set aside the award a copy of the award should be filed, as we find that the fourth paragraph of s. 12 of Act No. XV of 1877 excludes from the period of limitation prescribed for an application to set aside an award the time requisite for obtaining a copy of the award. There is nothing in Chapter XXXVII of the Code of Civil Procedure, so far as I can see, which suggests that it is necessary to the validity of an application to set

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aside an award that a copy of the award should be filed with the application, or at the time when the application is made.

It is possible that the second, third and fourth paragraphs of s. 12 of Act No. XV of 1877 were enacted, so far as applications for review of judgment or to set aside an award are concerned, to meet cases in which a person interested in applying for a review of judgment or to set aside an award might desire to inform himself accurately by a perusal of the copy of the decree or order or judgment, as the case might be, as to what its actual contents were and as to any legal or other objections there might be to it. The Legislature may have intended that persons under such circumstances should not by the law of limitation be compelled to hurry into an application for review of judgment or into an application to set aside an award until they had full opportunity of considering the terms of the decree or order or judgment.

I fully recognize the fact that statutes must, as far as possible, be construed so as to produce harmony and not discord, but in this case no discord would result from holding that an application for review of judgment need not under s. 625 of the Code of Civil Procedure be accompanied by a copy of the decree, order or judgment sought to be reviewed. It has never been the practice in this Court in applications for review of judgment to require that the applicant should file a copy of any decree, order or judgment. Under the rules of this Court, so far as they are concerned, it is not necessary to file a copy of any decree, order or judgment along with an application for review of judgment. My answer to this reference to the Full Bench is that in my opinion an application for review of judgment is perfectly legal, although it is not accompanied by a copy of the decree, order or judgment sought to be reviewed.

TYRRELL, J.—I quite agree. In the majority of cases of applications for review of a judgment, order or decree, copies of the judgment, order or decree would be superfluous and unnecessary to the purposes of the application, the records being usually in the record-room of the Court moved to review. To require the production of

such copies would be to impose a needless and therefore onerous outlay on litigants. I agree in the learned Chief Justice's answer to the reference.

KNOX, J.—I agree in the learned Chief Justice's answer to the reference and in the reasons given by him for that answer.

BLAIR, J.—I quite agree with the learned Chief Justice's answer to the reference and with the reasons given by him.

BURKITT, J.—I concur in the interpretation put by the learned Chief Justice on s. 625 read with s. 541 of the Code of Civil Procedure, and in the reasons given for the conclusion at which he has arrived. In my opinion it cannot, be gathered from s. 625, read with s. 541, that these sections impose on a litigant the burden of procuring and paying for a copy of the decree order or judgment which he seeks to have reviewed. In the absence of any such precise provision I do not see why this Court should impose on an applicant for review the burden of procuring a copy of the judgment decree or order sought to be reviewed, which, I may add, in most cases might be superfluous as the record would be in the Court whose order was sought to be reviewed. I agree in the answer proposed by the learned Chief Justice.

AIKMAN, J.—The interpretation which Mr *Buldeo Ram* contends we should put on s. 625 of the Code of Civil Procedure, would have the effect of altering what I understand has been the settled practice of this Court for many years. It would impose additional expense on parties, which, as has been pointed out by my brother Tyrrell, would not be attended with any corresponding advantage, for the Court which has to deal with the application would in most cases have the record in its own custody. I should be very unwilling to put upon the section an interpretation which would have those results, unless it were quite clear to me that that was the meaning of the Legislature. I am not satisfied that the Legislature had this in its mind when it framed s. 625. I agree with the learned Chief Justice and my brother Judges.

Application allowed.

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June 6.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox,
Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.*

GOPAL DAS (APPLICANT) v BIHARI LAL (OPPOSITE PARTY).*

*Civil Procedure Code, s. 351, cl. (d)—Insolvency—"Other act of bad faith"—
Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.*

The expression "any other act of bad faith" as used in s. 351 cl. (d) of the Code of Civil Procedure means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution, and whether or not the bad faith is connected with the liability which has resulted in that decree. *Bavachi Packi v. Pierce, Leslie & Co.* (1) approved. *Salamat Ali v. Minahan* (2) distinguished.

THIS was a reference to a Full Bench of the Court made by Tyrrell and Blair, JJ. The facts of the case sufficiently appear from the referring order, which is as follows:—

"One Babu Gopal Das was judgment-debtor under a decree which ordered him to pay to the decree-holder moneys which the judgment-debtor had dishonestly appropriated to his own use. When the decree came to execution the judgment-debtor made an application under s. 344 of the Code of Civil Procedure. At the trial the District Judge of Allahabad dismissed the application, holding that it was bad and must be defeated under s. 351 (d) of the Code. Mr. *Fateh Chand*, for the appellant, contended that the Judge erred in going behind the matter of the application as such and considering the nature of the particular debt for which the decree had been put in execution; that is to say, considering whether that debt was or was not tainted with bad faith. A ruling of this Court under similar circumstances in I.L.R. 4 All. 337 is in favor of this contention. In that judgment it was held that under the terms of s. 351 it was no part of the Judge's duty to go behind the decree and see in what way the debt had been

* First Appeal No. 129 of 1892 from an order of G. F. G. Forbes, Esq., Officiating Judge of Allahabad, dated the 29th June 1892.

(1) I. L. R., 2 Mad., 219.

(2) I. L. R., 4 All., 337.

incurred. We should have followed this ruling, which, to some extent at least, commends itself to us; but we were confronted with authorities for the contrary proposition, which are not without weight. In 12 B. L. R. App. 12, Pontifex, J., referred to some conflicting decisions upon this point, and in I. L. R. 2 Mad 219 it was held by Innes and Forbes JJ., that the words of cl. (d) of s. 351 'the matter of the application' embrace the insolvency and all the facts and circumstances material to explain the insolvency. We think that the question is sufficiently important to be referred for decision to a Full Bench and it is accordingly referred."

Mr. *Fateh Chand* and Babu *Datti Lal*, for the appellant.

Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the respondent.

The judgment of the Court (EDGE, C. J., TYRRELL, KNOX, BLAIR, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J.—

In this case Bihari Lal obtained a decree against Babu Gopal Das in his capacity of trustee. He also was entitled under a decree in appeal in the suit to costs. Bihari Lal proceeded to execute the decree. In execution of that decree Babu Gopal Das was arrested. Babu Gopal Das applied under s. 344 of the Code of Civil Procedure to be declared an insolvent. The Court, taking into consideration the bad faith and fraud in the matter of the misappropriation of the trust funds in respect of which the decree was obtained, refused to declare Babu Gopal Das an insolvent. From that order Babu Gopal Das has appealed to this Court.

It has been contended that the Court was not justified under s. 351 of the Code of Civil Procedure in rejecting the application of Babu Gopal Das, and could not for the purposes of that section take into consideration what were the circumstances under which the liability which ended in the decree in execution arose. In support of that contention Mr. *Fateh Chand*, for the appellant, cited the cases of *In the matter of—a prisoner in the Great Jail* (1), *In re Soopersaud* (2), *In re Khettsag Das* (3), *Butler v. Lloyd* (4),

(1) 1 Indian Jurist p. 8.
(2) 2 Indian Jurist p. 90.

(3) 3 B. L. R., App. 14.
(4) 12 B. L. R., App. 12.

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Smith v. Boggs (1), *In re Gurudas Bose* (2) and *Salamat Ali v. Minahan* (3), and he referred us to *Bavachi Packi v. Pierce, Leslie Co.* (4) as opposed to his contention.

To dispose of these cases to which we have been referred in Lower Bengal, it is difficult as to some of them to ascertain whether Act No. VIII of 1859 was or was not the Act which applied. In some of them s. 281 of Act No. VIII of 1859 appears to have been the section upon which the decision was based. None of those cases were decided on the construction of s. 351 of the present Code of Civil Procedure. There is one decision on the construction of s. 281 of Act No. VIII of 1859, but that decision cannot in our opinion be applied to the construction of s. 351 of Act No. XIV of 1882. The object of the two sections was essentially different, and the effect of an order under one of those sections is different from the effect of an order under the other. The governing words in s. 281 of Act No. VIII of 1859, as far as those cases were concerned, were the words by which the plaintiff "may make proof that the defendant, for the purpose of procuring his discharge without satisfying the decree, has wilfully concealed property or his rights or his interests therein, or fraudulently transferred or removed property or committed any other act of bad faith." It is obvious that the "other act of bad faith", to be within that section, must have been committed by the defendant for the purpose of procuring his discharge without satisfying the decree. The discharge in that case was the discharge from jail, and not from the debt. Section 281 of Act No. VIII of 1859, dealt only with the question between the particular creditor who had caused his judgment-debtor to be arrested and the particular judgment-debtor who was arrested, whereas s. 351 of the Code of Civil Procedure deals with the order to be made upon an application to declare a judgment-debtor an insolvent, which declaration, if made, would affect not only the creditor who was executing his decree against the person or the property of the judgment-debtor, but all the scheduled creditors.

(1) 5 B. L. R., App. 21.

(2) 7 B. L. R., App. 23.

(3) I. L. R., 4 All. 337.

(4) I. L. R., 2 Mad. 219.

Section 351 of Act No. XIV of 1882 is essentially different in its terms to s. 281 of Act No. VIII of 1859. It is true the matters to be inquired into in cl. (b) of s. 351 are confined to concealments, transfers and removals of property subsequent to the institution of the suit in which the decree in execution was passed with intent to defeat creditors. Clause (c) of s. 351 relates to matters which might be anterior or might be subsequent to the institution of the suit in which the decree in execution was passed, and certainly authorises an inquiry into matters preceding the application to be declared an insolvent. It is contended, however, that the other act of bad faith mentioned in cl. (d) of s. 351 must be an act of bad faith in or during the pendency of the application to be declared an insolvent. In our opinion there is nothing in cl. (d) to so limit the scope of the inquiry. If the contention of the judgment-debtor were correct, the general words "any other act of bad faith regarding the matter of the application" in cl. (d) could not be construed as *ejusdem generis* with the words in clauses (b) and (c). It appears to us that "any other act of bad faith" mentioned in cl. (d) means any act of bad faith not in s. 351 before mentioned which bore directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and would not exclude any act of bad faith by which he had incurred a then still subsisting liability to any of his creditors, whether the particular creditor was or was not the creditor whose decree was in execution, and whether or not the bad faith was connected with the liability which resulted in that decree. In our opinion the High Court of Madras in *Bazachi Packi v. Pierce, Leslie & Co.* (1) correctly held in reference to the construction of cl. (d) of s. 351 that "the matter of the application embraces the insolvency and all the facts and circumstances material to explain the insolvency." This view is inconsistent with a decision of this Court in *Salamat Ali v. Minskan* (2). It is to be observed that in that case this Court was influenced by the findings of facts.

With this expression of opinion the Bench which referred the question will be left to deal with the appeal.

(1) I. L. R., 2 Mad. 219.

(2) I. L. R., 4 All. 337

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July 24.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji and Mr. Justice Burkitt.*

SABHAJIT (APPLICANT) v. SRI GOPAL (OPPOSITE PARTY).

Civil Procedure Code ss. 335, 334, 2, 244—Execution of decree—Application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Representative of party to suit—Auction purchaser, who is also assignee of decree.

In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favor the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favor. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside.

Held that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and being unappealable, an application for revision thereof might lie.

The auction-purchaser, though he happened also to be the assignee of the decree, was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor within the meaning of s. 335.

THE facts of this case were as follows:—

One Kundan Lal brought a suit upon a mortgage for sale of a four-biswa share in a certain village, the defendants to that suit being Sita Ram and Daya Kishan, the predecessors in title of Sri Gopal. The defendants pleaded that they were in possession under two mortgages of the 20th of January 1856 and the 5th of July 1869. The Court of first instance dismissed that suit, but the appellate court decreed the plaintiff's claim subject to the rights of the defendants under their prior mortgages. Kundan Lal having thus obtained his decree for sale, sold the same to Sabhajit, who in execution thereof brought the mortgaged property to sale and purchased it himself and obtained possession. Thereupon Sri Gopal claiming as heir to Sita Ram and Daya Kishan applied to be restored possession of the property mortgaged. The auction-purchaser

Application No. 9 of 1894, for revision of an order of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 25th November 1893.

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resisted this application on the allegation that Sita Ram and Daya Kishan were never in possession as mortgagees, but had obtained possession merely as auction-purchasers under a simple money decree. The Court (Subordinate Judge of Aligarh) found that Sita Ram and Daya Kishan had been in possession as mortgagees, and allowing Sri Gopal's application made an order that he should be reinstated.

The auction-purchaser thereupon applied to the High Court for revision of the order of the Subordinate Judge above mentioned.

This application coming before a single Judge was by him referred to a Division Bench and thence by Tyrrell and Burkitt, JJ., to the Full Bench.

Mr. *A. H. S. Reid*, for the applicant.

Babu Jogindro Nath Chaudhri and *Munshi Gobind Prasad*, for the opposite party.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.—

This is an application under s. 622 of Act No. XIV of 1882. The assignee of a decree-holder, plaintiff, brought the property which had been decreed to be sold to sale and purchased it himself. He obtained possession. Thereupon a party to the suit in whose favor the decree was in this sense that it directed that the sale should not affect his interests, which were those of a usufructuary mortgage in possession, applied to the Court executing the decree to put him again in possession and dispossess the auction-purchaser. The Court passed an order reinstating the usufructuary mortgagee in possession, and that is the order which is questioned in this application for revision.

It was objected that this application does not lie, it being contended that the order in question was one made under s. 244 of Act No. XIV of 1882. Another contention in support of the objection was that, if the order was made under s. 335 of Act No. XIV of 1882, the auction-purchaser had a remedy by suit to establish his title to possession.

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On the other side it was contended that the order was one made in fact under s. 335, but one which could not be made in law under that section, it being contended that the usufructuary mortgagee was a person coming within the description of a "judgment-debtor" as that term is used in s. 335. That contention was carried further, and it was argued that, although the Court might have had jurisdiction to make such an order under s. 244, it having in fact made the order under s. 335, this application in revision lay. It was also contended on behalf of the applicant that the Court will exercise its discretion under s. 622, although the appellant had under the last clause of s. 335 a right of suit given to him.

The preliminary objection could not be decided by us without going into the case in order to ascertain under what section this order could lawfully have been made. As to the contention that this was a case to which s. 244 applied, that was supported on two lines of argument. One was that s. 334 was the section which applied in this case, and that on the authority of *Muttia v. Appasami* (1) an order passed on a matter within s. 334 was an order made under s. 244. We need not say whether we agree with or differ from the view of the Madras High Court on that point. Until it is necessary to do so we reserve our right to consider whether an order under s. 334 is an order under s. 244. The other line on which it was contended that s. 244 applied was this:—It was said that the auction-purchaser was, as the assignee of the plaintiff in the suit, a representative of a party to the suit. His opponent, the usufructuary mortgagee undoubtedly was a party to the suit. The usufructuary mortgagee was a party in whose favor a decree, so far as he was concerned, was made. It has been decided by this Court, and it is a matter upon which we are all agreed, that a purchaser at an auction-sale under a decree is not, as such purchaser, a representative of a party or a party to the suit in which the decree was passed, although if such auction-purchaser was a transferee, within the meaning of s. 232 of Act No. XIV of 1882, of the decree, he might be, as such transferee, a representative of a party to the suit for the

(1) I. L. R., 13 Mad. 504.

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purpose of s. 244 of that Code. In this particular matter with which we have now to deal the auction-purchaser stands simply in the position of auction-purchaser and does not stand in the position of a plaintiff or a decree-holder. Rightly or wrongly he got into possession and now claims to be put back into possession, not as a decree-holder, for as such he had no right to possession, but as the auction-purchaser at a sale held under the decree. It is a pure accident that the person who was the transferee of the decree of the plaintiff is also the auction-purchaser, and, so far as the auction-purchaser's rights as such are concerned, they must be regarded as if he and the transferee of the decree were two different persons. The decree had been executed. In our opinion the auction-purchaser was not as such in the only position in which he could appear here in this matter either a party or the representative of a party to the suit. The reason why it is not necessary for us to express an opinion as to the decision of the High Court at Madras to which we have referred is that, in our view of the law, the usufructuary mortgagee, although a party to the suit, was not a judgment-debtor within the meaning of s. 334 or s. 335. A judgment-debtor is defined in s. 2 of Act No. XIV of 1882; and this particular mortgagee was not a party against whom either a decree or an order relating to this matter had been passed, and consequently did not come within the description of s. 334, and did come within the description of a party other than a judgment-debtor in s. 335. In our opinion the Court below had jurisdiction to entertain the application of the usufructuary mortgagee and to make the order which it did make under s. 335 of Act No. XIV of 1882.

There is a preliminary objection to this application in revision which has not been taken and which relieves us from the necessity of deciding whether or not any effective suit to have the decree under which the sale was made construed, could, having regard to the circumstances of this case, to the fact that the auction-purchaser as such took such title as he obtained at the sale under the decree and such other title as he had as the transferee of the decree, and to the fact that the usufructuary mortgagee was a party to the decree,

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have been brought by either of these parties against the other under the last clause of s. 335, in relation to the order of the Court the subject of this application, and consequently relieves us from having to decide whether this is a case in which we ought to exercise our discretion by reason of a right of suit being open to the applicant.

The preliminary point is that in no view of this application does it come within s. 622 of Act No. XIV of 1882. The Court below exercised a jurisdiction vested in it. It exercised that jurisdiction lawfully and regularly under the section of the Code applicable to the case. There was no circumstance in this case which brought it within s. 622. It is not necessary to express any opinion as to the merits of this application. We dismiss the application with costs.

Application dismissed

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Before Mr. Justice Knox and Mr. Justice Aikman.

GHURE AND ANOTHER (DEFENDANTS) v. MAN SINGH AND ANOTHER (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Partition of village originally one into three separate maháls—New record of village customs framed on partition—Rules of the Board of Revenue of the 13th November 1875—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), s. 257.

Where at the settlement of a village constituting a single mahál a record of rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate maháls, and, in accordance with the rules of the Board of Revenue of the 13th November 1875, issued under s. 257 of Act No. XIX of 1873, a new record of village customs was framed which did not give to the sharers in any one of new maháls any right of pre-emption in respect of land situated in another mahál, it was held that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favor of the co-sharers in any one mahál in respect of land situated in another mahál.

Per. AIKMAN, J.—Where a village, originally one, is divided by perfect partition into two or more maháls, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying outside any given

* First Appeal No. 125 of 1894, from an order of H. G. Pearse, Esq., District Judge of Agra, dated the 20th August 1894.

mahál, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one mahál the co-sharers had pre-emptive rights against each other.

Motee Sah v. Musummat Goklee (1) and *Jai Ram v. Mahabir Rai* (2) referred to.

Under the above circumstances the mere retention of a community of interest in certain property such, e.g., as roads, &c., will not give the sharers in one mahál any right of pre-emption over land situated in another. *Nazir-ud-din v. Kadir Baksh*, (3) referred to; *Gokal Singh v. Mannu Lal* (4) dissented from.

THIS was a suit for pre-emption. The village in which the share in respect of which pre-emption was claimed originally consisted of a single mahál and under the *wajib-ul-arz* prepared at the settlement the co-sharers in this mahál had pre-emptive rights *inter se*. In 1881 the village was divided by perfect partition into three separate maháls and a separate *wajib-ul-arz* was framed for each mahál by the officer making the partition. These new *wajib-ul-arzes* did not provide for pre-emption by a sharer in one mahál of land situated in another mahál. Under these circumstances the plaintiffs being co-sharers in one of the maháls into which the village had been divided brought their suit to pre-empt land situated in another mahál. The Court of first instance (Subordinate Judge of Agra) found that the *wajib-ul-arz* prepared for each mahál on partition was a valid document and that under it the plaintiffs had no right of partition in respect of land situated in another mahál.

The plaintiffs appealed. The Lower Appellate Court found that the new *wajib-ul-arz* had been prepared by the partition amín and was not signed by the co-sharers or by the officer making the partition, and did not supersede the older *wajib-ul-arz* prepared at the settlement. That Court accordingly allowed the appeal and remanded the case under s. 562 of Act No. XIV of 1882 for trial on the merits.

From this order of remand the defendants appealed to the High Court.

(1) S. D. A., N.-W. P. 1861, Vol. II, 506.

(2) I. L. R., 7 All. 720.

(3) Weekly Notes 1894, p. 198.

(4) I. L. R., 7 All., 772.

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Pandit *Moti Lal* and Pandit *Baldeo Ram Dive*, for the appellants.

Mr. *T. Conlan*, Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondents.

KNOX, J.—This is an appeal from an order passed by the District Judge of Agra in an appeal before him, whereby he set aside a decree passed by the Subordinate Judge of Agra and remanded the case, under s. 562 of the Code of Civil Procedure, for determination of certain issues which were raised before the Subordinate Judge, and which issues the Subordinate Judge, in consequence of his finding upon the first issue raised, had not determined. In order to understand the case it will be necessary to briefly set out the contentions between the parties. The respondents before us were plaintiffs in the Court of first instance. Their claim was to enforce a right of pre-emption over certain land which had been sold by one Umrao Beg to one Ghure. The respondents before us and Umrao Beg were none of them residents in the village of Chanderbhanpore. Chanderbhanpore originally consisted of one mahál. In 1881 this mahál was divided by perfect partition into three perfect maháls, respectively termed mahál Umrao Beg, mahál Mogal Beg and mahál *Ghair Khwahindagan*. The share of land in dispute is situate in mahál Umrao Beg, and it is admitted that since the perfect partition took place the plaintiffs-respondents are not shareholders in that mahál Umrao Beg, they are sharers in the mahál termed *Ghair Khwahindagan*. They base their claim to enforce the right of pre-emption over the property situate in mahál Umrao Beg, not upon any record of village customs prepared after partition, but upon a record of village customs, which forms part of the record of rights drawn up at the Settlement which was completed in the days when the village of Chanderbhanpore still consisted of one single mahál. The vendees of the share in dispute, who were defendants in the Court of first instance, and are appellants before us, resisted the claim of pre-emption on the ground that a record of village custom, which they say was prepared after Perfect partition, conferred no rights of pre-emption in favor of the

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shareholders over the land situate in their mahál. The Court of first instance considered the record of village custom which was prepared at the time of partition to be a good and valid document, and as it conferred no pre-emptive rights in favour of the shareholders of the other mahál, dismissed the claim brought by the respondents. The Lower Appellate Court treated the document prepared after partition, as being no valid record of village custom; held that it could not supersede the record of village custom which had been prepared at the village settlement, and hence issued an order of remand, in order that the rights of the parties might be determined by the provisions contained in that document. It is contended before us that this was an illegal order, inasmuch as the learned Judge was wrong in holding that the record of village custom prepared in 1881 was not a good document. It is contended that the document is a genuine record of village custom and has been in existence for years without being questioned by any of the parties; and that record being a good document, and conferring no claim upon the respondents, the respondents were in no way entitled to pre-empt, and their claim should have been dismissed. The issue thus clearly raised before us is, whether the record of village custom prepared at the time of partition is, or is not, a good and valid document. It has been admitted, and very properly admitted, by the learned pleader for the respondents, that if it is a good and valid document, and if it be held to govern the rights of parties in the present case, the respondents' claim must fail.

A good many questions of considerable difficulty were raised in the course of the hearing, and we have had the benefit of arguments which on both sides have been prepared with great care and thoroughness. Had it been necessary to decide some of the points so raised, the case would have been one for the consideration of a Full Bench of this Court. I am of opinion that the matters directly and substantially raised in this appeal can be determined apart from those questions. The record of village custom in this case has been prepared in accordance with the rules which were issued by the Board of Revenue on the 13th of November 1875,

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and under the powers given them by clause (f), section 257 of Act No. XIX of 1873. The preface to those rules shows that the rules had received the sanction of Government. It was not prepared under the rules which issued in 1885 and superseded the rules of 1875. In the present case moreover we are not dealing with a record of village custom which has simply been blindly taken from the record which was prepared at settlement and repeated *totidem verbis* without any consideration whether the rules prepared at settlement did apply to the state of things which ensued upon the great revolution which must take place in every village which was once undivided but has come to be divided into two or more separate and perfect maháls. The record of village custom is part of a larger document which is known as the record of village rights and the existence of which is necessary to every mahál. There can be no such thing in law as a mahál for which a separate record of rights has not been framed. This is evident from the way in which the term "mahál" has been defined in s. 3, sub-s. (1) of Act No. XIX of 1873. The record of rights in every mahál is no ordinary document; it is a document which by law is entitled to so much weight that by one of the provisions (*i.e.*, s. 91) of Act No. XIX of 1873, all entries in it when properly made and attested are presumed to be true until the contrary is proved. The authority for the preparation of the document is contained in rule 23 of the rules above quoted of the 13th of November 1875. Under that rule, when a perfect partition is approaching completion,—“The map and rough schedule shall then be returned to the amin who shall forthwith make out records of the new maháls or pattis in the same form as the records of settlement prescribed under the rules of settlement under XIX of 1873.” This rule, it will be seen, refers us back to certain rules issued by the Board, under the powers given them in s. 257 (e) and (f) of Act No. XIX of 1873, on the 28th of September 1875. The important rules for the purposes of this appeal are rules Nos. 30, 49 and 51. Rule No. 23 of the Circular of the 13th of November 1875 lays down no provision concerning any attestation. All that it requires is that the records of the new mahál be made out in the same form as the

records of settlement. It must not be forgotten that no partition record, which includes the record of rights made for the partition of mahals, is complete until it has been sanctioned by the Collector of the district. Even if the partition has been made by an Assistant Collector, the law still requires that it be reported to the Collector of the district for sanction and confirmation. That sanction and confirmation can never take place without formal attestation by the Collector of the district signed by his signature to the records prepared at partition. A still further safeguard is provided by the appeal which s. 132 of Act No. XIX of 1873 gives to the Commissioner of the division from the confirming order of the Collector of the district up to one year from the date from which the partition took effect. It may be that in view of the safeguard thus provided by law the Board of Revenue did not consider it necessary to lay down a rule prescribing that the entries made in the record of rights prepared at partition should be attested in the particular manner provided by rule 49 of the rules of the 28th of September 1875, when the record of rights is prepared for the first time at settlement. Be that as it may, the highest weight that can attach to an objection that the record or a portion of it has not been attested or that the attestation of them has not been required by any rule, is that the record is not one to which the provision of s. 91 of Act No. XIX of 1873 does apply. Now in this case the respondents do not ask us to presume anything upon the strength of the document prepared at the time of partition; they rely on the document prepared at the time of settlement. Upon that document they stand or fall, and their claim will not prevail, even if it be, which we do not think is the case, that the document prepared after partition is not a document to which the provisions of s. 91 apply. Recognising the importance of the record of village custom prepared at the settlement so far as the interests of his clients were concerned, the learned pleader for the respondents laboured at great length and with much persistency to the effect that the record still held good and governed the present case. He laid great stress upon the fact that it was a record of custom

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prevalent in the village and governing all within the local area of the village. His foundation rests upon the somewhat slender fact that the record of village custom contains in one place the word "*riwaj*." The word occurs at the introduction to that portion of the record of village custom which deals with the subject of pre-emption. He also laid great stress upon the fact that in dealing with pre-emption the record gives a preference to those who are shareholders in the "*deh*." His argument was that, however much the village of Chanderbhanpore might have been split up into separate maháls, there still remained one "*deh*," and that his clients were shareholders in that "*deh*." Assuming for the present that the record of village custom does set out that pre-emption in Chanderbhanpore at the time when the settlement record was prepared rested upon custom, and not upon contract then prepared among the shareholders, it is necessary to examine with great care and minuteness the exact nature of the custom, the extent to which it prevailed and the persons who were governed by it. We are dealing with a village which bears a Hindu name, the parties before us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining the terms in which it is recorded we cannot forget that it was recorded at a time when the village bore its natural and, from a Hindu standpoint, proper form of an undivided village and an undivided mahál. The term "*hissadar deh*" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were shareholders, and at a time when there existed no intention of the village brotherhood being separated or the land being broken up into distinct parcels in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place. Even where the existence of custom has been proved, it must not be forgotten that it is not custom but the general

law which regulates all beyond the custom. "Custom moreover is held to be discontinued owing to accidental circumstances. The fact of a perfect partition evidences not a mere accident, but an intention to break up, and to completely break up, the existing state of things. It would require therefore strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and provides when those circumstances have been wholly altered. We were referred to several cases in support of the doctrine that a record of village custom prepared at the time of settlement still prevails and governs when and after perfect partition has taken place. The first case which we were referred to was that of *Gokal Singh v. Mannu Lal* (1). In that case, however, there was apparently no record of village custom prepared after partition had taken place, and the only record of village custom which was in existence was that prepared at the time of settlement. It was moreover a case in which the contention was that the record of village custom contained covenants made between the parties, and not, as in the present case, a privilege and liberty created by the running of custom. The next case was that of *Matadin v. Mahesh Prasad* (2). This was one of those cases in which the village record of custom prepared after partition was a *verbatim* copy from the record of village customs prepared at the time of settlement. In that case, whether from accident or of design, the record of village custom prepared after partition conferred in express terms a right of pre-emption upon the co-sharers of the *mauza*. In that case the word '*mauza*' was deliberately used after partition had not only been intended but had been completed, and not used as '*dek*' has been in the present case when partition was not yet within the horizon. The next case was cited was that of *Kuar Dat Prasad Singh v. Nahar Singh* (3). That was a case in which Mr. Justice Straight, who delivered judgment, was careful to point out that he was at the time dealing with a particular *wajib-ul-arz* and not with cases where, one record of village custom having existed for the purpose of a common village area, and that village area having been divided into separate revenue

(1) I. L. R., 7 All., 772. (2) Weekly Notes, 1892, p. 100.

(3) I. L. R., 11 All., 287.

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areas, no record of village custom had been drawn up for the new area. The record of village custom which was under consideration in that case was one which in express terms conferred a right of pre-emption upon shareholders in a *patti* other than that in which the land sought to be pre-empted was situate, and, in the event of refusal by them, conferred the right in equally well-defined terms upon the sharers of the village, and this too after partition had taken place. There remains one case further which need be mentioned, and which was cited by the learned pleader for the respondents. *Shiam Sundar v. Amanant Begam* (1). The record of village custom which had to be interpreted in that case was a record prepared at a time when three villages formed a single mahál, a state of things widely different from the case now under consideration. It was a special case decided under special circumstances, as the judgment shows.

The result then is that the document upon which the respondents base their right and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things. The finding of the learned Judge was erroneous, the order of remand was unnecessary, as the memorandum of appeal filed before him shows. There remains no further matter for decision, and I would, setting aside the order made by the learned Judge, restore that of the Court of first instance and dismiss the respondents' claim.

AIKMAN, J.—This is an appeal by the vendees who were defendants in a pre-emption suit brought by the plaintiffs, who are respondents here. The plaintiffs and the vendor, who is not before us, were co-sharers in a village which at one time formed an undivided mahál. In 1881 the village was divided into three maháls, which it will be sufficient to describe as maháls Nos. I, II and III. The

(1) I. L. R., 9 All., 234.

property sold lies within mahál No. I. The plaintiffs own a share in mahál No. III, but own no property in mahál No. I. They came into Court asserting their pre-emptive right in virtue of a *wajib-ul-arz* which was prepared at a time when the village formed but one mahál. The defendants resisted their claim on the ground that a new *wajib-ul-arz* had been prepared at the time of partition by which, if a valid document, it is admitted the plaintiffs have no right to pre-empt. The validity of this document is disputed by the plaintiffs. In my opinion it is valid and furnishes an answer to the plaintiffs' claim. At the time when the partition was carried out, it was under the then existing rules as much a part of the duty of the officer executing the partition to prepare a new *wajib-ul-arz* for each mahál, as it was to prepare a new *jamabandi*. The Board of Revenue, in the rules they have framed for carrying out partitions, prescribed that the officer executing partition is to make out the records of the new maháls in the same form as the records of settlement prescribed under the rules of settlement in Act No. XIX of 1873. Section 90 of that Act lays down that the Board shall from time to time prescribe the form in which the record is to be made, and the manner in which it is to be attested. In the rules relating to partition nothing is said as to the manner in which the new records are to be attested. It was contended on behalf of the plaintiffs, that as the co-sharers had not signed this new *wajib-ul-arz*, it was of no force. It is the custom at settlement that this *wajib-ul-arz* is signed by the co-sharers; but this is not required by the rules framed by the Board (*vide* rule 49, Book Circular No. 15, 28th of September 1875); consequently the mere absence of the signatures of the co-sharers would not be sufficient to invalidate the document. It is signed by the officer who executed the partition. As pointed out by my brother Knox, the law gives ample opportunity to the co-sharers to raise any objection, either before the Collector at the time of confirmation or by way of appeal to the Commissioner of the Division, in regard to anything which may have been done at the time of partition. But from 1881 up to May 1893 no objection

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is shown to have been raised by any co-sharer to the proceedings of the partition aamin. I therefore hold that this document would supply a sufficient answer to the plaintiffs' suit. This would be enough to decide the case, but as an important question has been raised as to whether after a partition an owner of land in one máhal can assert a right of pre-emption when a sale is made of property situated in another mahál, I think it necessary to give my opinion in regard to this also.

Partitions are of two kinds—perfect and imperfect. In the case of an 'imperfect' partition it has never been held that a right of pre-emption disappears with the partition. In the case of *Ram Pershad v. Buljeet Singh* (1) it was remarked :—"It is true that there has been a partition, but it was an imperfect one. The lands were divided, but the joint liability of all to the Government revenue remains. Therefore the property is still one *mahál*, the whole of the lands of which are liable for the Government revenue. In this state of imperfect partition it is decided by various cases that the condition as to pre-emption in the old *wajib-ul-arz* remains in force." It is different in the case of 'perfect' partition. In the case of *Motee Sah v. Musummat Goklee* (2) the Judges say, with regard to such a partition :—"An essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." In the case of *Jai Ram v. Mahabir Rai* (3) Mr. Justice Oldfield said :—"The condition as to pre-emption only affected the shareholders of the mahál as long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahál. The plaintiff could after separation exercise no right of pre-emption against and in respect of shareholders and property as so separated, nor could the separated shareholders exercise any right of pre-emption against the

(1) N.-W. P., H. C. Rep. 1867, p. 252. (2) S. D. A., N.-W. P., 1861, Vol. II. p. 506

(3) I. L. R., 7 All., 720.

plaintiff and his property remaining in the mahál from which they had separated." And in the same case Mahmood, J., held that the terms of an old *wajib-ul-arz* were superseded by a partition at which a new *wajib-ul-arz* was framed which created rights of pre-emption amongst the co-sharers of the new maháls.

The case principally relied on by the respondents, and a case which is undoubtedly in their favor, is that of *Gokal Singh v. Mannu Lal* (1) quoted by my brother Knox. With every respect to the learned Judges who were parties to that decision I am unable to concur with them. It was there held that there may still be some community of interest and also a considerable community of things held and used in common by all the inhabitants, such for instance as roads, drains and other things which are necessary to all. Hence even after partition something is still left in common, and with reference to the merits of this case there remained enough community of interest to justify the preference given by the *wajib-ul-arz* to partners in the village over strangers in respect of the right of pre-emption. With reference to the reason here assigned I would quote a passage from a recent decision of this Court, *Nazir-ud-din v. Kadir Bakhsh* (2). "In the present case, although the pre-emption according to the *wajib-ul-arz* is to be according to the Muhammadan law, still it is to be a pre-emption for co-sharers in the mahál and not for persons other than co-sharers, even if such persons may have some right or interest in the *shamilat* lands of the mahál." I am of opinion that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other maháls, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one mahál the co-sharers had pre-emptive rights against each other. In the case of *Mata Din v. Mahesh Prasad* (3) Mahmood, J., said:—"Partition, whether perfect or imperfect, is a matter which relates to the province of the recovery of revenue." But in my view partition relates to much more than the revenue,

(1) I. L. R., 7 All, 772. (2) Weekly Notes 1894, p. 193.

(3) Weekly Notes, 1892, p. 100.

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though it is provided by law that it must be conducted in such a manner that the revenue does not suffer. It is my experience that what gives rise to an application for partition is not so frequently a dispute as to revenue as the presence in the village of some quarrelsome or litigious co-sharer who seeks to take more than the others consider him entitled to. If it were held that notwithstanding partition such a co-sharer could, whenever a sale took place, assert his right of pre-emption in the mahál which had been divided off, this manner of avoiding quarrels would not be put an end to. In the result I have no hesitation in concurring with my brother Knox in holding that this appeal should be decreed.

The order of the Court therefore will be that the order of the lower Court be set aside, the claim of the plaintiffs be dismissed, and the appeal be decreed with special costs in all Courts.

Appeal decreed.

Before Mr. Justice Burkitt.

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February 6.

REFERENCE UNDER S. 28 OF ACT NO. VII OF 1870.*

*Act No. VI of 1882 (Indian Companies Act) ss. 169, 214—Appeal—Court-fee—
Act No. VII, 1870 (Court-fees Act), sch. ii, Art. 11 (b).*

An order under s. 214 of Act No. VI of 1882 (Indian Companies Act) is not a decree or an order having the force of a decree, and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act No. VII of 1870 (Court-fees Act), sch. ii, art. 11 (b), with a Court-fee stamp of Rs. 2.

THIS was a reference under s. 28 of Act No. VII of 1870, by the taxing officer of the Court to the Judge appointed under s. 5 of the Act to decide questions relating to Court-fees of the following question:—Whether on a memorandum of appeal from an order of a District Judge under s. 214 of Act No. VI of 1882 (Indian Companies Act), a fixed Court-fee of Rs. 2 is payable under Act No. VII of 1870, sch. ii, Art. 11 (b) or an *ad valorem* fee?

The facts out of which the reference arose sufficiently appear from the order of the Court thereon.

* Reference in First Appeal from order Nos. 43 to 75 of 1894.

Messrs. *A. Strachey* and *H. Vansittart*, in support of the reference.

Messrs. *W. Wallach* and *A. E. Ryves*, *contra*.

BURKITT, J.—This is a reference from the taxing officer to me as taxing Judge under the provisions of s. 5 of the Court-fees Act. In considering it I have had the great advantage of the assistance of my brothers Knox and Blair, who at my request sat with me to hear it argued. They authorise me to say that they concur in the order I am about to pass and in the reasons for it.

The matter has arisen in the following manner:—During the winding up of the Himalaya Bank, Limited, the Judge of Saharanpur, acting under ss. 162, 163 and 214 of the Companies Acts of 1882 and 1887, directed certain Directors and Officers of the Bank to repay large sums of money to the Bank. Memoranda of appeal to this Court were admitted on a Court-fee stamp of Rs. 2 under Art. 11 of the second schedule to the Court-fees Act. Subsequently however the officer whose duty it is to see that fees are paid under the second chapter of the Court-fees Act reported to the Registrar that in his opinion those memoranda of appeal should have borne "*ad valorem* stamps," as he considered they had been presented against orders "having the force of a decree" and therefore were chargeable with Court-fees under Art. I of the first schedule of the Court-fees Act. The Registrar has referred the question to me for decision.

The question then is, have those memoranda of appeal been presented against orders which have the "force of a decree?" It is contended in the office report that the orders must have the force of a decree, because it is said they, under s. 166 of the Companies Act, can be enforced in the same manner as a decree of a Court made in a suit.

A similar question was raised before the Bombay High Court, and it was then held that a Court-fee of Rs. 2 under Art. 11 of the second schedule of the Court-Fees Act was sufficient; *vide* the

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the judgment of Mr. Justice Nanabhai Haridas on a reference from the taxing officer, dated the 28th of November 1885.

I have come to the same conclusion.

It may be doubtful whether any 'order' in the strict sense of that word, as defined in the Code of Civil Procedure, is passed by the winding up Court under s. 214 of the Companies Act. That section seems to be the complement of s. 162 *et seqq.* of the Act which give to the winding up Court large inquisitorial powers in order to enable it to get in the assets of the Company under liquidation. When by virtue of those powers the Court has satisfied itself that any director, manager, officer, &c., has been guilty of malpractices, the Court may then take action under s. 214, and on the application of a liquidator, creditor, or contributory, after examining into the conduct of the director, manager, etc., may compel the latter to repay money or to contribute to the assets of the Company. The power so given to the Court is clearly a summary power to compel defaulting directors and other officials to repay money misappropriated or contribute money to the assets of the Company by way of compensation.

It is at least doubtful whether the result of proceedings under s. 214 can be considered to be an 'order.' The proceedings leading up to such an order, if it be an order, are not in the strict and technical sense judicial proceedings at all. No procedure is imposed at any stage, no person need be formally cited, no plaint need be filed, no party has a right to prove his case in such way as he chooses. The whole power is in the Court, which may examine into the conduct of the person complained of, and after such examination may 'compel' repayment or contribution by way of compensation. The word 'compel' seems to contemplate an order entirely distinct from an order adjudicating upon the rights of parties. It presupposes, not a formal adjudication, but simply a conviction in the mind of the Court that such order as it is going to make is just. The Act contemplates no order by way of formal adjudication upon the matter of right. That which it authorises is a compulsory, that is to say an executive, order. But it by no

means follows that it is an order having the force of a decree. It certainly is not a decree. It differs from a decree in many essentials and attributes. Section 166 certainly allows it to be enforced in the manner in which decrees of the winding up Court made in any suit pending therein may be enforced. But this is merely a provision as to the procedure which may be observed in enforcing the order. The mode in which an order may be enforced is not necessarily an indication or a criterion of the nature of the order. There is a great difference and no inter-connection between the force of a decree and the method of enforcing it. I have been unable to find any authority as to the meaning of the words 'force of a decree' used in art. 11 of the 2nd schedule of the Court-fees Act. In the case of *Jamsang Devabhai v. Goyabhai Kikabhai* (1), which was a case of a second appeal to the High Court in a question involving a right to partition, it was held, at page 412, that as the appeal was a 'miscellaneous appeal' arising from an order and not from a decree a Court-fee of Rs. 2 was sufficient. The same principle would *prima facie* apply to the present case. Further, as the Court-fees Act is a fiscal enactment, it is one whose provisions are to be construed strictly, and, whenever there is any ambiguity or doubt, in favor of the subject.

Now the words 'having the force of a decree' are not very intelligible. Their meaning has not been interpreted by any authority, and in the present cases I am not prepared to say that the orders in question have such force. I am therefore of opinion that the Rs. 2 Court-fee is sufficient.

FULL BENCH.

Before Sir John Edg, Kt, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

QUEEN-EMPRESS v. NANNHU.

1895
February 8.

Criminal Procedure Code, s. 421—Summary rejection of appeal—Court to record reasons for rejection.

It is advisable that a Court when rejecting an appeal in a criminal case under the provisions of s. 421 of the Code of Criminal Procedure, 1882, should record

(1) I. L. R. 16 Bom 408.

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shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision.

THIS case was referred to a Bench by an order of Aikman, J., of the 26th of January 1895—"with the view of having it determined whether a Sessions Judge or Magistrate, when acting as an Appellate Court, can reject an appeal without assigning any reason "

The facts of the case sufficiently appear from the judgment of the Court.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

EDGE, C.J., BANERJI and AIKMAN, JJ.—This is an application to this Court to exercise its functions in criminal revision. The applicant was convicted of the offence punishable under s. 411 of the Indian Penal Code. The evidence appears to have been conclusive that he was guilty of the offence of which he stood charged. He appealed against the conviction to the Sessions Judge; and the Sessions Judge rejected the appeal, this being the order made:—"Rejected summarily under s. 421, C. P. C." By s. 421, C. P. C., the Sessions Judge meant s. 421 of the Code of Criminal Procedure, 1882.

There is absolutely no doubt that the appeal could not have succeeded. The man was properly convicted and sentenced.

The only question is one which is raised in the Court now and then, *viz.*, whether an order such as that made by the Sessions Judge is sufficient. It is quite plain from the last paragraph of s. 421 of the Code of Criminal Procedure, 1882, that the Appellate Court is not bound before rejecting under that section a criminal appeal to send for the record. Without deciding that when a Court acts under the first paragraph of s. 421 of the Code of Criminal Procedure, 1882, it is necessary for the Court to express its views of the case, beyond stating that it considers that there is no sufficient ground for interfering, we think it advisable for Courts of Session and Magistrates when acting as Appellate Courts to state shortly in their order the reason or reasons which influence them in coming to the conclusion that there is no sufficient ground for interfering

in the case. We do not say that it is necessary to write a judgment in the form prescribed by s. 367 of the Code of Criminal Procedure, 1882, or anything like it. We only say that we think it is advisable for those Courts whose orders may be challenged by application in revision to record something which may be a guide for the Court acting in revision.

We dismiss this application.

Application dismissed.

APPELLATE CIVIL.

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QURAN-
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January 24.

Before Mr. Justice Blair and Mr. Justice Burdett.

RATTANJI (DECREE-HOLDER) v. HARI HAR DAT DUBE (JUDGMENT-DEBTOR).*

Execution of decree—Attachment of immovable property—Order striking off application for execution but maintaining attachment—Appeal.

A decree-holder in execution of his decree applied for the sale of certain immovable property of his judgment-debtor attachment of which had been obtained before judgment; but on objection being made to the sale he took no further steps to complete the execution of the decree, and the Court struck off the execution-proceedings, maintaining the attachment. Against this order the decree-holder appealed. *Held* that, inasmuch as the order in question was not a judicial disposal of the application for sale and would not preclude the decree-holder from continuing the execution of his decree, an appeal from such order was superfluous and must be dismissed.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellant.

Mr. *T. Conlan*, Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the respondent.

BLAIR and BURDITT, J.J.—In our opinion this appeal is quite unnecessary. On the statement of facts it appears that the predecessor in title of the appellant obtained in May 1890, a money decree against the late Rajah Hari Har Dat Dube. It further appears that under the provisions of s. 483 of the Code of Civil

* First Appeal No. 153 of 1891, from an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 13th June 1891.

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Procedure two houses, the property of the Rajah, were attached before judgment. Afterwards, in execution of the decree, an application was made to the Subordinate Judge in July 1890 asking him to direct the sale of the attached houses. The usual sale notifications were issued, and in September 1890, the wife of the judgment-debtor raised objection to the sale, claiming the houses as her own property. The sale was postponed pending the decision of her objections, and also was stayed by order of the District Judge. Eventually, on June the 3rd, 1891, the Subordinate Judge called on the decree-holder to take some other step in the matter of the execution, and on June the 13th, 1891, as the decree-holder had not taken any such step up to that day, the Subordinate Judge struck off the case, but maintained the attachment. That order is now under appeal. In our opinion that order is nothing more than a temporary adjournment of an adjudication on the original application for sale, and on the objection taken to it. That application is still pending undisposed of, awaiting orders in the Court of the Subordinate Judge. The order striking it off is in no way a judicial disposal of the application. It does not decide whether the decree can or cannot be executed, in whole or in part, by sale of the attached houses. It contains no order unfavorable to the decree-holder's right to execute the decree, or which in any way prevents the decree-holder from asking the Subordinate Judge now to take up again and dispose judicially of the application made on July the 19th, 1890. Execution by sale of the attached houses has up to the present not been refused by the Subordinate Judge. Indeed, so far as the proceedings have gone, they are in favor of the decree-holder's rights, seeing that a notification for sale was issued, though the sale was subsequently postponed. The application for execution in the way specified in that application has so far simply been shelved undisposed of. Under such circumstances we think there is nothing to appeal against. No order, as the law has been understood since the case of *Dhonkal Singh v. Phakkar Singh* (1) and Act No. VI of 1892 has been passed which in any way damnifies the

(1) I. L. R., 15 All., 84.

decree-holder. All he has to do is to ask the Subordinate Judge to go on with the proceedings which had been temporarily laid aside in June 1891. When that request is made to the Subordinate Judge it will be for him to consider who is the person against whom, and what the manner in which, execution-proceedings are to be continued, and as to that matter his attention is called to s. 234 of the Code of Civil Procedure and to the case of *Hirachand Harjivandas v. Kasturchand Kasidas*, (1). It is quite unnecessary and would be premature for us now to enter into the question as to who is the legal representative of the deceased judgment-debtor. As to that matter we express no opinion upon, and draw no inference from, the finding submitted by the Subordinate Judge on the issue remitted for trial by this Court as to whether Rajah Shankar Dat Dube was or was not the legal representative, within the meaning of s. 234, of the deceased judgment-debtor, Rajah Hari Har Dat Dube. As we consider this appeal to have been unnecessarily brought we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Burdett.

SHANKAR DAT DUBE (OBJECTOR) v. J. G. HARMAN & Co. (DECREE-HOLDERS).*

Civil Procedure Code, ss. 234, 244, 273, 283—Execution of decree—Representative of deceased judgment-debtor—Practice—Appeal.

Certain decree-holders obtained during the lifetime of their judgment-debtor attachment of certain immovable property as belonging to the said judgment-debtor; but on the decree-holders' seeking to bring the property to sale one S. D. came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S. D. and the widow of the judgment-debtor (who died about the time the previous objection was filed) placed on the record as representatives of the judgment-debtor. S. D. filed a similar objection to this application also; but both objections being heard together on the 6th September 1892 were dismissed, and S. D. was placed on the

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* First Appeal No. 283 of 1892, from an order of Kunwar Bharat Singh, District Judge of Jaunpur, dated the 6th September 1892.

(1) I. L. R., 18 Bom., 224.

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record as representative of the deceased judgment-debtor. On appeal by S. D. against "the order of the District Judge of Jaunpur of the 6th September 1892," it was held that the order making S. D. a party to the execution-proceedings as representative of the judgment-debtor rendered any order as to his former objection superfluous and that order was appealable under s. 244 of the Code of Civil Procedure.

The facts of this case are fully stated in the judgment of Burkitt, J.

Mr. T. Conlan, Mr. Abdul Majid and Pandit Sundar Lal for the appellant.

Babu Durga Charan Banerji for the respondents.

BURKITT, J.—This is an appeal in a case of execution of a decree. The facts are as follows:—

On the 31st of March 1890, Messrs. Harman & Co. obtained a decree against the late Rajah Hari Har Dat Dube. The first application for execution was made on April 15th, 1890, by the decree-holders, who asked that certain immovable property (a house) should be attached and sold in satisfaction of the decree. The application was granted, and the attachment of the house was effected on the 24th of April 1890. Those execution-proceedings were struck off on June 30th, 1891, probably to clear the Court's file of pending cases at the end of the half-year; but the attachment was maintained.

The second execution-application was made on July 7th, 1891. In it the decree-holders asked that the house already under attachment should be notified for sale and brought to sale to satisfy the decree. This was allowed, and September 3rd, 1891, was fixed for the sale. Subsequently the sale was twice postponed by the parties and once was stayed by order of the District Judge, in whose Court a suit for the recovery of the entire Jaunpur *riyasat* was pending at the suit of Rajah Shankar Dat against Rajah Hari Har Dat.

Rajah Hari Har Dat died at Madras on January 13th, 1892. On the following day, January 14th, 1892, (but probably before he knew of the death of his brother) Rajah Shankar Dat filed in the

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execution Court an objection, which purported on its face to have been made under the provisions of s. 278 of the Code of Civil Procedure. He objected to the sale of the house on the ground that it was his property by virtue of an agreement, a compromise and decree, that it was not the property of Rajah Hari Har Dat and was not liable to be sold in execution of a decree against the latter. On this objection notice was ordered to issue to the decree-holders and January 23rd, 1892, was fixed for the hearing. The date for the hearing was postponed from time to time on application by Shankar Dat. Eventually June 30th, 1892, was fixed for the hearing, and on September 6th, 1892, the case was disposed of, the objection raised by Shankar Dat being disallowed, and it was ordered that execution should issue.

But meanwhile the decree-holders had taken other proceedings; for on March 17th, 1892 (in consequence of Rajah Hari Har Dat's death), they applied to the execution Court, asking that the execution-proceedings should be continued against Rani Sahudra Kuar, widow of the deceased Rajah, whom the decree-holders described as heir of the deceased, and against Rajah Shankar Dat, who, the application alleged, was in possession of the property of the deceased. The application asked that the names of those two persons should be substituted on the record for Rajah Hari Har Dat's. Notice of this application was sent to Rajah Shankar Dat under s. 248 of the Code of Civil Procedure calling on him to show cause against it on March 29th 1892. Raja Shankar Dat showed cause on March 25th, 1892, and raised the same objection as he had already set forth in his previous objection on January 14th, 1892, namely, that the property under attachment was his property and was not liable to be taken in execution of a decree against his deceased brother. The consideration of this objection of March 25th, 1892, was from time to time adjourned in the same manner as the consideration of the objection of January 14th, on identical applications made as to each by Shankar Dat, and simultaneously with the former objection it was disallowed on September 6th, 1892, by an order identical with that on the other objection.

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Rajah Shankar Dat appealed to the High Court against the order disallowing his objection of the 25th of March 1892. On the case being called on the respondents' vakil took a preliminary objection to the hearing of the appeal. His objection was founded on s. 283 of the Code of Civil Procedure, and was to the effect that as the appellant had not instituted any suit as permitted by s. 283 to establish his right to the property in dispute, as claimed by him in his objection under s. 278 of the Code on January 14th, 1892, the order made under s. 281 rejecting that objection had become conclusive against the right he then claimed, namely, the right he now sought to establish by the present appeal. We have heard Mr. *Durga Charan* and Mr. *Conlon* at length on this point. On a full consideration we have come to the conclusion that the objection is untenable and unsound. In our opinion the crucial question for our consideration is, would a suit by Shankar Dat in the terms of s. 283 of the Code of Civil Procedure have been maintainable? Now the facts show that Shankar Dat was brought into the execution-proceedings by the decree-holders, who, by their application of March 17th, 1892, treated him as a legal representative of the deceased judgment-debtor. Their application was that the execution might be continued as against him. The application was clearly one made under s. 234 of the Code, inasmuch as by it the decree-holders asserted that Shankar Dat was in possession of certain assets of the deceased judgment-debtor, and asked for sale of those assets in execution of their decree. Notice of that application was, under s. 248 of the Code, served on Shankar Dat and the application for execution in the manner prayed for by the decree-holders was eventually allowed by the execution Court on August 8th, 1892. Mr. *Durga Charan* admits that *this* appeal has been properly framed as an appeal from an order passed under s. 244 of the Code, and that had the decision been the other way his clients would have been entitled to appeal; and considering who the present litigants are, it is clear that the matter decided by the execution Court was one between the decree-holders and the representative of the judgment-debtor. The question decided by the Court was as to the right of the decree-holders to bring to sale

certain property as assets belonging to their judgment-debtor in the possession of the appellant, as to which the latter set up an adverse title. Such a question is one arising between the parties or their representatives and relating to the execution of the decree. As such, under the opening clause of s. 244, it could be determined only by an order of the execution Court and not by a separate suit. If Shankar Dat were to institute the suit mentioned in s. 283 of the Code the only issue which could be raised in that suit is, are the decree-holders entitled to sell the house in dispute as the property of their deceased judgment-debtor? That is the very question which had been decided by the order under s. 244. But, as Shankar Dat was impleaded as a legal representative under s. 234 and as an order had been passed against him in that capacity under s. 244 of the Code, it clearly follows from the opening clause of s. 244 that he could not have maintained the separate suit. His only remedy was by way of appeal from the order. As to a person brought in as a representative after decree it has been held by a Full Bench of the Calcutta High Court in *Puncianun Bando-padhya v. Robia Bibi* (1), following previous decisions, that "an objection taken by a person who has become the representative of a judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative is a matter cognisable only under s. 244 of the Code, and is not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed." That case is quite on all fours with the facts in this case. From the moment the appellant Shankar Dat was impleaded as a legal representative holding assets of the deceased judgment-debtor the two proceedings must be taken to have been proceedings under s. 244. Up to that time Shankar Dat no doubt had been a stranger prosecuting a claim under s. 278 to the disputed property. But as soon as, by the citation of the decree-holders under s. 234, he became a representative, he from that time ceased to be a stranger to the execution-proceedings and became a party as representative of the deceased

(1) I. L. R., 18 Cal., 711.

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judgment-debtor. The sections 278 to 283 of the Code deal with persons who at the time are strangers to the execution, while s. 244 deals with parties and their representatives, and Shankar Dat was none the less a representative because he was brought in as such after decree and while execution-proceedings were in progress. That being so, we are of opinion that the objection he had filed on January 14th, under s. 278 of the Code as a stranger to the execution-proceedings, fell to the ground and was superseded by the proceedings under s. 244, in which Shankar Dat occupied the position of a representative. That objection was henceforth useless and infructuous, and might well have been laid aside by the Court as if it were a dropped proceeding. We hold that subsequently to March 17th, 1892, there was but one proceeding pending in the execution Court and not two proceedings, and though some orders of adjournment were nominally passed on the objection of January 14th, 1892, and a copy of the order disallowing the objection was written on it also, still in our opinion those acts of the Court were perfectly unnecessary and superfluous. There was but one order and one only on September 6th, 1892, and it did not become two orders because it was written on the petition of objection of January 14th, as well as on that of March 25th, 1892.

Of course if it had been the case that before the proceedings under s. 244 had commenced, *i.e.*, before Shankar Dat had been constituted a legal representative by the application under s. 234, any order allowing or disallowing the objections made by him under s. 278 had been passed, that order made under such circumstances would have been conclusive if no suit had been instituted within one year to contest it. But once a person has been made a representative of a deceased judgment-debtor all questions between him and the other party relating to the execution of the decree must be decided under s. 244, and none the less so because that person while a stranger to the execution may have filed an objection under s. 278 of the Code. In our opinion such an objection at once disappears on the commencement of proceedings under s. 244 and any formal order passed on it is superfluous.

For the above reasons we are of opinion that the appellant could not have maintained a suit to establish a right to the property in dispute claimed by him in his objection of January 14th, 1892. We therefore hold that the preliminary objection taken by Mr. *Durga Charan*, which proceeds on the supposition that the order passed on that objection is conclusive within the meaning of s. 283, cannot be supported.

We accordingly proceed to hear the appeal on the merits.

BLAIR, J.—I entirely concur in the conclusion and reasons of my brother, and wish only to add a few words to emphasise my opinion on the nature of the proceedings enquired into. The judgment-creditor was throughout *dominus litis*. It was in his power and at his own choice to proceed with his execution at large without putting upon the record a representative of the judgment-debtor. In such a case a third person, who was neither a party to the suit nor a representative, could have taken objections in the proceedings under s. 278. On the other hand, it was in the option of the judgment-creditor to proceed under s. 234 against a representative of the deceased in possession of the assets in relation to which execution is sought. In my opinion the moment the judgment-creditor chose to introduce into these execution-proceedings the appellant in this case as a representative holding assets of the original judgment-debtor, he, in point of law, absolutely extinguished any proceedings which had been taken under s. 278. The current of decisions is clear. Section 278 applies only to persons who are not parties to the proceedings. The moment a person who had taken an objection under s. 278 was made by the decree-holder a party to the proceedings he was excluded from the category of persons to whom alone s. 278 applies and included in the category of persons to whom no other section than 244 is applicable. I conceive therefore that there was not in point of law any proceeding under s. 278 before the Judge at the time when he affected to deal with the objection under that section and that all he said or did under that section is an absolute nullity. We now proceed to deal with the appeal.

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[On the 4th of February 1895 the appeal was disposed of, being decreed with costs with reference to a previous decision of the same Bench in F.A. No. 268 of 1892, decided on the 29th of January 1895.]

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February 11.

ORIGINAL CIVIL.

Before Mr. Justice Blair and Mr. Justice Burdett.

THE HIMALAYA BANK, LIMITED, IN LIQUIDATION (PLAINTIFF) v. F. W. QUARRY AND ANOTHER (DEFENDANTS).*

Act No. VI of 1882 (Indian Companies Act) Part IV, ss. 130, 132—Company—Winding up—"Court"—Act No. IV of 1882 (Transfer of Property Act) s. 59—Mortgage by deposit of title-deeds—Mortgage by deposit of title-deeds in Mufassal before the coming into force of Act No. IV of 1882.

Held that with regard to a Company the registered office of which was at Mussooree "the Court," as that term is used in Part IV of Act No. VI of 1882 (Indian Companies Act), means the Court of the District Judge of Saharanpur, and not that of the Subordinate and Small Cause Court Judge sitting at Mussooree or Dehra.

Up to the 1st of July 1882, being the date of the coming into force of Act No. IV of 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title deeds with a creditor with intent to secure a debt. *Waghela Rajsanji v. Shekh Masludin* (1); *Varden Seth Sam v. Luckpathy Royjee Lallah* (2); *Bunsee Dhur v. Heera Lall* (3); *Lalji v. Gobind Ram* (4) and *Mirza Muhammad Ali v. Nawab Salat Jang* (5) referred to.

A mortgage effected as above described will cover future advances as well as the existing debt or contemporaneous advance in respect of which it was made. *Ex parte Langston* (6) referred to.

- THE facts of this case are as follows:—

This was a suit instituted in the Court of the Subordinate Judge of Dehra Dún by the Himalaya Bank, Limited, through the Official Liquidator, to recover a sum of Rs. 20,000 alleged to be due from one F. W. Quarry, a vakil of the High Court, and his wife to the Bank upon an overdrawn joint account. The plaintiff stated that some Rs. 50,000 were in reality due on the account, but, inasmuch

* Original suit No. 1 of 1894 decided on the 11th of February 1895.

(1) L. R. 14 I. A. 89.

(2) 9 Moo. I. A. 307.

(3) N.-W. P. H. C., Rep. 1869, p. 166.

(4) 6 Select Reports 165.

(5) 4 Select Reports 168.

(6) 17 Vesey Jr. 227.

as there was little probability of recovering more than the sum specified, the balance of the claim had been relinquished. The plaintiff also claimed a declaration that a deposit of title-deeds relating to property in Mussooree known as the Powys Cottage estate, said to have been made with the plaintiff-bank on the 3rd of May 1878, as security for overdrafts on the said account constituted a valid mortgage of the estate, and prayed that a decree might be given for sale, if necessary, of that estate. The plaintiff asked for costs and future interest, and further claimed that the decree might authorize the sale or acceptance of the surrender value in part payment of the Rs. 20,000 of a certain policy of insurance granted on the life of the first defendant in favor of the second defendant by the Positive Government Security Life Insurance Co. and assigned to the bank by the second defendant on the 28th of October 1884.

This last claim was admitted on the part of the defendants. As to the other issues raised by the plaintiff the first defendant while the case was before the Subordinate Judge either traversed or declined to admit them. He also stated that if the account were examined it would probably be found that some Rs. 5,000 were due to him for professional services by the plaintiff-bank. The suit, as has been mentioned, was originally filed in the Court of the Subordinate Judge of Dehra Dún, but, when it had reached the stage of issues having been fixed was, on the application of the plaintiff, transferred to the High Court for trial in the exercise of its extraordinary original civil jurisdiction.

Mr. *A. Strachey* and Mr. *H. Vansittart* for the plaintiff.

Mr. *F. W. Quarry* for the defendants.

BLAIR, J.—This suit was instituted in the Court of the District Judge of Saháranpur, thence transferred to the High Court by its order of 13th August, 1894, and now comes before us in the exercise of our extraordinary original civil jurisdiction. Mr. *Strachey* and Mr. *Vansittart* appear for the plaintiff-bank.

The defendant, F. W. Quarry, appears in person for himself and as vakíl for his wife, the second defendant.

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He takes the preliminary objection that the whole liquidation proceedings, including the appointment of the liquidator, are invalid, on the ground that they were taken in a Court which had no jurisdiction to entertain such proceedings. The Court in which a suit must be brought for a Company's Liquidation is thus defined by s. 130 of Act No. VI of 1882 :—“‘Court’ shall mean the principal Court having original civil jurisdiction in the place in which the principal registered office of the Company is situate.”

The principal registered office of the plaintiff Company is at Mussooree. The same person possesses both the powers of a Subordinate Judge and those of a Small Cause Court Judge, and in both capacities holds his Court at Mussooree, in which place no higher Court possessing civil jurisdiction sits. The liquidation proceedings, it was contended, should therefore have been brought in the Court of the Subordinate Judge, and the Court of District Judge at Saharanpur had no jurisdiction. To adopt that construction of s. 130 of Act No. VI of 1882 would require us to read into that section after the word “jurisdiction in” the words “and sitting in the place, &c.” No authority was cited in favour of this contention nor was it raised either in the Court below or in this Court upon the hearing of the application to transfer. It was suggested to us that the policy of the Act was to provide prompt and inexpensive means for the disposal of the numerous cases which arise in small liquidations. I am of opinion that the policy of the Act was to provide a Court of high competence to deal with matters often involving large interests and complex questions. We overruled this objection to our jurisdiction, which indeed hardly needed the elaborate refutation of Mr. *Strachey*, who appears for the plaintiff Company. A further objection to our jurisdiction was taken at the close of the first defendant's speech, and was taken for himself only. He claimed as an Englishman to be entitled to have his case tried by sworn Judges, and impeached the enactment of s. 13 of the Oaths Act as *ultra vires* of the Indian Legislature. The contention was not supported by even a decent semblance of legal argument. The inconsecutive and inconclusive observations addressed to us at

great length by Mr. Quarry were in my opinion a gross abuse of the indulgence of the Court which had been extended to him in his difficult position as uniting the two characters of party and advocate. It was also a scandalous waste of public time. The objection was overruled.

The suit, in so far as it involves matter of contention, is a suit for the payment of Rs. 20,000 and for a declaration that a good and valid mortgage had been made of certain immovable property called Powys Cottage as a security for an overdrawn floating banking account, and, failing payment, for the enforcement of that mortgage.

The Rs. 20,000 is part of a larger sum, probably about Rs. 50,000, alleged to be due, the remainder of the debt being relinquished by the plaintiff Company as beyond hope of recovery.

The material allegations of the plaint are that in 1878 the second defendant was indebted to the plaintiff-bank with which she had a current account, and that on May 3rd in that year the first defendant, as her agent, deposited with the bank the title-deeds of Powys Cottage as a security. That in 1880 the plaintiff-bank was directed to make a joint account of the separate accounts of the two defendants, which henceforth stood in their joint names, both of them severally operating upon both sides of the account, the title-deeds of Powys Cottage remaining in the possession of the bank as security for the joint account. That on or about October, 1884, the first defendant, upon his own account and on that of his wife having promised to effect a good legal mortgage of the Powys Cottage estate, took away for that purpose two of the deeds from the bank. No legal mortgage was ever executed. The defendants in 1891 refused to make the legal mortgage, and the plaintiff alleges that such failure to execute was due to the fraud of the defendants.

The case which was proved differs in some respects from that set up in the plaint. The allegation that the direction to make the account a joint account was given in 1880, was obviously founded

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upon an entry in the bank's books in that year of Mr. Quarry's name at the corner of the ledger in addition to that of Mrs. Quarry with which that account was headed. It appears on that part of the account for the first time. The liquidator could have had no personal knowledge of the matter, and it was alleged by Mr. *Strachey*, and not denied by Mr. Quarry that no communication had passed in relation to this suit between the liquidator and the only person who possessed a personal knowledge of all facts in relation to the account, Mr. Moss, who had been the bank's manager through the whole period of the bank's existence. It is notorious that Mr. Moss had been confined in Naini Jail from a time prior to the commencement of this suit up to the moment of his appearance in Court as a witness for the plaintiff. Mr. Moss' allegation differs from the plaint in this that he alleges the account to have been a joint account from the very commencement in August 1874, and that from that date continuously the first defendant operated upon both sides of the account. The complaint of Mr. Quarry that his defence had been prejudiced by not having his attention called by the plaint to the items anterior to 1880, seems to me to be groundless; for he had himself applied in a letter of January 9th, 1886, (Ex. X.) for a pass-book relating to the earlier items, and it is not disputed that the pass-book relating to the whole account had been before him, and had been to some extent examined by him. His letter of January 29th, 1886, (Ex. 66) shows that among the items of the vouchers for which he desired copies, none were of an earlier date than 1879. I understand that the vouchers for every item were in Court ready to be produced if asked for, and that Mr. Quarry had been allowed every facility for their inspection.

After carefully considering every case that has been cited in argument, I have come to the conclusion that there is no substance in any of the technical contentions argued for the defence. It seems to me that there can be no question whatever that the deposit of deeds as security for an overdrawn account constitutes in English law a good equitable mortgage and in Indian Law a good simple mortgage. It seems to me clear that upon grounds of common

sense as well as authority it is reasonable to infer from the continuance for a long time of the deposit of title-deeds that they are intended, as between the parties, as security for a continued contemporaneous overdraft. I feel no doubt, therefore, that if the facts set forth by the plaintiff are proved, a perfectly good and efficient security was created by the deposit of these deeds in 1878, and that they remained as such security until the close of the bank.

[The remainder of the judgment is occupied solely with the questions of fact arising in the case and is, therefore, not reported.]

BURKITT, J.—This suit has been instituted by the Official Liquidator of the Himalaya Bank, Limited, to recover from the defendants the sum of Rs. 20,000 on the allegation that the defendants were on July 8th, 1891, in debt to the bank on their joint overdrawn banking account to an amount of more than Rs. 50,000, including interest; but as the plaintiff-bank did not hope to be able to realise more than Rs. 20,000 from the defendants it relinquished its claim to anything more than Rs. 20,000 and asked for a decree for that sum only. The plaintiff further prayed for a declaration that a deposit of title-deeds alleged to have been made by the first defendant in the bank on May 3rd, 1878, is a good and valid mortgage of the Powys Cottage estate in Mussooree, and for an order that if the Rs. 20,000 be not paid the Powys Cottage estate be sold and the proceeds applied towards payment of that sum. There is also a prayer for costs and future interest on Rs. 20,000 from date of suit. The plaintiff finally contains a prayer that the plaintiff bank be authorised to sell or accept the surrender value in part payment of the Rs. 20,000 of a certain policy of insurance granted on the life of the first defendant in favour of his wife, the second defendant, by the Positive Government Security Life Insurance Co., Ltd., which had been assigned to the plaintiff-bank by Mrs. Quarry on October 28th, 1884. As to this last prayer I may say that the defendants admit the claim of the bank. This question need not again be referred to.

The suit was instituted in the Court of the Subordinate Judge of the Dehra Dún district, but, on the application of the plaintiff-

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bank, was transferred for trial to this Court in the exercise of its extraordinary original civil jurisdiction. The plaintiff-bank was represented at the trial by Mr. *Strachey* and Mr. *Vansittart*. The defendants were not represented by counsel, but the first defendant, (who is a vakíl of this Court) conducted the defence on his own behalf and also on behalf of his wife, the second defendant, from whom he held a vakalatnámah. Only two witnesses were examined, namely, F. Moss, the late manager of the Himalaya Bank, and the first defendant: the second defendant was not called.

Stated generally—and without going into any details for the present—the case for the bank, on the evidence of the witness Moss and on the numerous exhibits filed, is that in August 1874, a floating current account was opened in the bank in Mrs. Quarry's name under instructions from the first defendant; that both defendants were to operate on that account, both of them paying in and drawing out money; that in May 1878, that account was overdrawn by nearly Rs. 6,500; and that on May 3rd, 1878, the title-deeds of the Powys Cottage estate were deposited in the bank by the first defendant as security. It is further contended that the defendants from time to time promised to execute a regular mortgage of the Powys Cottage estate to the bank, and that two of the title-deeds were in October 1884, handed back to the first defendant for the express purpose of drafting the mortgage; that despite of frequent promises and expressions of regret at the delay by the first defendant the mortgage was not executed, though the overdraft continued to increase, and that the first defendant retained possession of the two title-deeds till the bank went into liquidation, when he was ordered to restore them by the Judge of Saháranpur, in whose Court the liquidation proceedings were pending.

No written statement was put in by either defendant, but the Subordinate Judge, before the suit was removed to this Court for trial, questioned the first defendant generally as to the allegations of the plaint. The first defendant in that examination traversed or declined to admit any of the material facts stated in the plaint, except as to the matter of the insurance policy which he admitted. He also, as

vakil for his wife, adopted a similar line of defence. As to the sum alleged to be due from him, he asserted that, if the accounts were properly examined, it probably would be found that he was owed some Rs. 5,000 or thereabouts by the bank, for professional services, which he had not drawn.

Among the issues framed by the Subordinate Judge is one for which, as far as I can see, no foundation had been laid in the pleadings. It is the first issue, and is as follows:—"Were the proceedings to liquidate the plaintiff-bank taken in a Court which was without jurisdiction for that purpose?" The Subordinate Judge on this issue called on the first defendant to state and support his plea to the jurisdiction of the District Judge of Saháranpur to liquidate the plaintiff-bank. His argument in this court was that as the "registered office" of the Himalaya Bank, Limited, was at Mussooree in the Dehra Dún district, the Court of the Subordinate Judge of Dehra, a Court which sits in Mussooree for six months in the year and at Dehra during the remaining months, was, under s. 130 of the Indian Companies Act, "the Court" in which the liquidation proceedings should have been taken, and not the Court of the District Judge of Saháranpur. On the basis of this contention it was argued that the appointment of the liquidator by the District Judge was bad and that this suit by the bank in the name of that liquidator could not be maintained. We overruled this contention, as we were of opinion that before we could accept it we should have to read the words "and sitting at" into s. 130 after the words "jurisdiction in" in the third line of that section. The "principal Court having original civil jurisdiction" in Mussooree, where the registered office of the bank was situate, is the Court of the District Judge of Saháranpur and not the Court of the Subordinate Judge of Dehra. The jurisdiction of the District Judge of Saháranpur, as such, extends over the three revenue districts of Muzaffarnagar, Saháranpur and Dehra, in the latter of which Mussooree is situate, and though the District Judge does not usually sit at Mussooree, or indeed at any place other than Saháranpur within his jurisdiction, for civil business, he is none the less throughout all the three

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revenue districts within his jurisdiction the "principal Court having original civil jurisdiction" in every place within those districts. This is clear from the General Clauses Act (No. I of 1868), ss. 2 and 12, the Bengal, N.-W. P. and Assam Civil Courts Act (No. XII. of 1887), s. 10, and Act No. XXI of 1871, s. 3, as modified by Act No. XII of 1891. The District Judge of Saháranpur is therefore "the Court," as that term is used in Part IV of the Companies Act, and the liquidation proceedings were properly taken in his Court at Saháranpur.

One of the most important prayers of the plaint is that a mortgage by deposit of title-deeds said to have been made to the bank in May 1878 should be declared to be a good and valid mortgage. The position taken up by the first defendant as to this is (1) that no such mortgage was in fact made, (2) that a mortgage of the kind known to English law as an equitable mortgage by deposit of title-deeds was unknown to Indian law in the Mufassal (as distinguished from the Presidency towns) and could not be enforced. I propose first to take up and discuss the second contention. Broadly stated, the first defendant's contention is that s. 59 of the Transfer of Property Act, No. IV of 1882, did no more than codify the law as it existed when that Act was passed, and that as the first clause of that section undoubtedly now prevents the creation in the Mufassal of a mortgage by delivery of documents of title to immovable property by a creditor with intent to create a security for one hundred rupees or upwards, it follows that such a mortgage was unknown to the law in the Mufassal previous to the coming into force of Act No. IV of 1882, and cannot be enforced by suit.

To that contention I am unable to accede. I am of opinion that s. 59 of the Transfer of Property Act did make a very great and important change in the law. Before that Act came into force there was no law at all resembling the Statute of Frauds in force in the Mufassal. There was no enactment which required that a transaction of the nature of a mortgage securing Rs. 100 or upwards should be in writing and registered. The law then made no provision requiring contracts, *e. g.*, of mortgage or sale, to be in

any particular form. Contracts might be oral or in writing, but, if reduced to writing, the Registration Act required that in certain circumstances they should be registered. As remarked by Mr. Macpherson at the commencement of Chapter IV of his well known treatise on the Law of Mortgage in British India,—“Previous to the 1st of July, 1882, when Act IV of 1882 came into force, parties might throughout India enter into a contract of mortgage in the same manner as they might make any other contract, that is to say, their agreement might be either verbal or in writing.” This extract contains, I have no doubt, a correct exposition of the law as it stood before July, 1882, and the defendant has failed to cite any authority to the contrary. That which a Court, bound to decide according to “justice, equity and good conscience” in the absence of any express enactment, has to look at is the intention of the parties to an agreement, and, on ascertaining that agreement, it is the duty of the Court to enforce it, if it be a lawful contract, without imposing on the parties to it a particular form which the law, as it stood when the contract was made, did not require. Their Lordships of the Privy Council in *Waghela Rojsanji v. Shekh Masludin* (1) interpret “equity and good conscience to mean the rule of English law, if found applicable to Indian society and circumstances.” Now, bearing in mind who the parties to this suit are and the strong probabilities that they intended to contract according to English law, it is difficult to imagine why the alleged contractual agreement (which is one of a nature recognised and enforced by English law) should be considered to be inapplicable to them. In *Farden Seth Sam v. Luckpathy Royjee Lallah*, (2) at pages 324 and 325, their Lordships of the Privy Council, applying the rule of “justice, equity and good conscience” and distinguishing between the *lex loci rei site* (i.e., the Mufassal) and the *lex loci contractus* (i.e., the Presidency town of Madras), held that the former law did not forbid the creation of a lien by a contract such as that sued on in the present case, i.e., by deposit of title-deeds. The first defendant contends that the case is not in point, as the deposit was made within the Presidency town. I however regard

(1) L. 14 L. 89.) 9 Moo. I. A. 307.

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the observations of their Lordships as a clear authority for the proposition that no law existed forbidding the creation of a mortgage lien by deposit of title-deeds in the Mufassal of the Madras Presidency. It has not been shown that the law in the N.-W. P. Mufassal was different. Similarly in *Bunsee Dhur v. Heera Lall*, (1) it was held by this Court that "by the deposit of deeds a security resembling a simple mortgage is created," but the Court was in that case unable to give effect to the security as the opposite party had a registered sale-deed which took effect against the oral agreement by which the security had been created and had had no notice of the lien by deposit. The first defendant, as to that case, contends it was unnecessary for the Court to decide whether a valid mortgage had been created as the registered sale-deed must have prevailed. But surely that is not so. Unless the Court had come to the conclusion that a good mortgage security had been created, it would not have been necessary, in the face of the registered sale-deed, to inquire into the question of notice. And as further authority for the proposition that in the Mufassal no writing was a necessary condition precedent to the creation of a good and valid mortgage or sale before the passing of Act No. IV of 1882, and that there is no Statute of Frauds in force in this country, I would refer to the case of *Lalji v. Gobind Ram Jani* (2) and to *Mirza Muhammad Ali v. Nawab Salat Jang* (3). On the above authorities I have come to the conclusion that up to July 1st, 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt. Such a transaction is quite consistent with the principles of justice, equity and good conscience as interpreted by the Privy Council, and is not inapplicable to Indian society and circumstances. And even in the absence of authority, I would have but little, if any, difficulty in holding that such contract, if proved, was one which a Court ought to enforce, if not forbidden, as is the case since July, 1882, by statute.

(1) N.-W. P. H. C. Rep., 1869, p. 166.

(2) 6, Select Reports, 185.

(3) 4 Select Reports, 168.

It has been held in English cases that the possession of the title-deeds raises a *prima facie* presumption that they are held as security for an advance, so as to give the holder an equitable mortgage, and that such a mortgage can be created without even a word passing. In short an existing debt or a contemporaneous advance, plus a deposit of documents of title, is evidence of the creation of an equitable mortgage. "The intent to create such a security may be established by written documents, alone or coupled with parol evidence; by parol evidence only that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit." (Fisher on the Law of Mortgage, 2nd ed. p. 32.) That such a security may be held to cover future advances as well as the existing debt or contemporaneous advances is shown by the case of *Ex parte Langston* (1) in which the Lord Chancellor is reported to have said:—"It has been long settled that a mere deposit of title-deeds upon an advance of money, without a word passing, gives an equitable lien, and, as the Court would infer from that deposit that the money then advanced should be charged as if there was a written agreement, there is no doubt that if it was made out by oath uncontradicted, additional advances would also be charged. It is not probable that a person having made an advance upon a security which he holds should make further advances without security." Other cases to the same effect will be found cited at p. 789 of White and Tudor's Leading Cases in Equity, in the notes to the case of *Russel v. Russel*, the rule to be deduced from which is stated to be that "a deposit of deeds, whether it be accompanied by a memorandum or not, may, by evidence either written or parol, be held to extend to subsequent advances upon proof that the deposit was originally made as a security for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it." The same rule is also thus stated in Fisher on Mortgages, 2nd ed., p. 37,—“As to future advances an equitable mortgage may, by parol evidence, and also (as it seems to have been

(1) 17 Vesey Jr. 227.

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intimated) by inference alone arising from possession of the deeds, be extended to cover such advances."

[The judgment then proceeded to deal with the questions of fact arising in the case, finding that the title-deeds were in fact deposited with the plaintiff-bank by way of security for a then existing debt and for future advances. The Court accordingly gave the plaintiff a decree for the sum claimed, with costs and future interest, with power to the plaintiff, in default of payment by August 11th, 1895, to bring to sale the Powys Cottage estate.]

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APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burdett.

BITHAL DAS (DECREE-HOLDER) v. SHANKAR DAT DUBE (OBJECTOR).*

Execution of decree—Act No. IX of 1872, (Indian Contract Act) ss. 2(d), 25, cl. (2) 70—Contract—Consideration.

H. D. and S. D., two brothers, constituted a joint Hindu family owning considerable landed property. H. D. having incurred heavy personal debts, the two brothers in 1879 united in applying to have their property taken over by the Court of Wards. This was done, and on the 17th of June 1889, while such property was still under the management of the Court of Wards, the two brothers entered into an agreement whereby H. D. remained as manager of the property with an allowance of Rs. 12,000 per annum for his support, but ceded to his brother absolutely and unconditionally all his proprietary interest in the family property, and all power to make the family property liable in any way for the payment of his debts. On the 6th of October 1889, the Court of Wards released the property freed from the liabilities imposed upon it by H. D. In 1891 one B. D. obtained in the Court of the Subordinate Judge at Agra a money-decree against H. D. H. D. died in the following year, and, subsequently to his death, B. D. sought to execute his decree against S. D. as representative of H. D. by attachment of property in the hands of S. D. S. D. objected to the attachment and his objection was allowed. B. D. appealed, and on this appeal it was *held* that having regard to the agreement of the 17th of June, 1889, above referred to, the property in question could not be attached as the property of H. D. The said agreement was not bad for want of consideration; the consideration being that at the request of his brother, which must be presumed from the circumstances of the case, S. D. had agreed to place his interest in

* First Appeal No. 105 of 1893, from an order of J. W. Muir, Esq., District Judge of Jaunpur, dated the 23rd March 1893.

the property under the management of the Court of Wards, and had also foregone, during the ten years that the estate was under the management of the Court of Wards, the greater part of his interest in the profits of the estate, and had refrained on cessation of the Court of Wards' management from suing his brother for an account; and even if this were not so, the agreement would be good either under s. 25, cl. (2) or under s. 70 of Act No. IX of 1872.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *D. N. Banerji* for the appellant.

Mr. *T. Conlan*, Mr. *Abdul Majid*, Pandit *Sundar Lal* and Munshi *Kalindi Prasad* for the respondent.

BURKITT J. (BLAIR J concurring). This is one of the many cases in which execution-creditors of the late Raja Hari Har Dat Dube of Jaunpur have sought to have execution of their decrees against the present Raja Shankar Dat Dube, under s. 234 of the Code of Civil Procedure, on the allegation that Shankar Dat had in his hands assets of his deceased brother on which the creditors were entitled to levy execution.

In the present case the decree-holder appellant, Bithal Das, obtained a decree for some Rs. 6,900 odd, a simple money-decree, against the Raja Hari Har Dat Dube in the Court of the Subordinate Judge of Agra in February 1891. Raja Hari Har Dat Dube died on January 13th, 1892. Execution-proceedings were commenced at Agra in May 1892, against Raja Shankar Dat and the widow of Raja Hari Har Dat, who were described as heirs of the deceased and as in possession of his property. The application was clearly one within s. 234 of the Code of Civil Procedure. Notices were issued to the two representatives, and, no appearance having been put in by them, the execution-proceedings were transferred to the Jaunpur Court. Accordingly, in July 1892, the present appellant applied in Jaunpur for execution by attachment of certain immovable (landed) property and of a sum of money lying in the treasury in deposit. Orders for attachment were issued by the Court on July 27th. Thereupon the Raja Shankar

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Dat, on August 17th, 1892, objected to the attachment. He denied that he was in possession of any assets of his deceased brother. He asserted that the property which the creditors sought to seize in execution had not been the property of the deceased Hari Har Dat at his death, and that it belonged to him (Shankar Dat) under an agreement of June 17th, 1889, a compromise dated September 4th, 1891, and a decree dated December 23rd, 1891. It was further pleaded in the alternative on behalf of Shankar Dat that he and his deceased brother were at the date of the death of the latter members of a joint undivided family, and that on his brother's death he (Shankar) acquired by survivorship any interest his brother might have had in the property.

In the Court below the District Judge rejected the decree-holder's application for execution. The reason for his order was because the decree-holder had not obtained an order for attachment or sale before the decree of December 23rd, 1891. In other cases in which orders for attachment had issued before that date the Court allowed execution to proceed against the attached property.

The decree-holder in the present case appeals against the order rejecting his prayer for execution against the property he sought to have attached and sold. The learned counsel who appeared for the appellant addressed to us a very able argument in which he endeavoured to show firstly, that the agreement of June 17th, 1889 was bad for want of consideration, and, secondly, that the two brothers Hari Har Dat and Shankar Dat were separate and were not members of a joint undivided family at the date of the death of the Raja Hari Har Dat.

Before we proceed to discuss these two contentions it is necessary to state a few preliminary facts as to the recent history of the family.

In the year 1875 the Jaunpur *riyat* belonged to Raja Lachmi Narayan and his two first cousins, the Rajas Hari Har Dat and Shankar Dat. The last-named was then a minor, as appears from the *sulahnamah* of January 2nd, 1875, No. 60 of the record, which was executed by the Collector of the district as guardian of Hari Har Dat. That document clearly shows that all

the three owners of the *riyat* were then joint, and that the object of this *sulahnamah* was to prevent any separation or partition then or at any future time and to give to the *riyat* the character of an impartible Raj—a character which of course such a modern Raj had not acquired. As to the management, it was provided that it should remain in the eldest member of the family, who was then Raja Lachmi Narayan Dat. The latter apparently did not long survive, and the estate soon became heavily involved in debt; for we find in 1879 the *riyat* was for the purpose of discharging its liabilities taken under the management of the Court of Wards, the then surviving two proprietors, Rajas Hari Har Dat and Shankar Dat, having been declared by Government, on their own application, to be incapable of managing their affairs.

Now there can be no doubt that of the debt in which the estate was involved by far the greatest portion, amounting to several lakhs of rupees, had been contracted by Raja Hari Har Dat. Consequently, when consenting to the Court of Wards taking over his interest in the *riyat*, and so giving a good title to purchasers of any portion of it which the Court of Wards might sell, the Raja Shankar Dat Dube, by his *ikrarnamah* of June 13th, 1879, (No. 61 of the record) expressly reserved any rights he might have against Raja Hari Har Dat in respect of whatever property might be left after the management of the Court of Wards had come to an end. The Court of Wards continued in possession of the *riyat* up to October 6th, 1889, i.e., for a period of about ten years, and during that time, by selling some portion of it and by economical management it paid off all the debts and handed over, we are told, some Rs. 11,000 in cash to the owners. But meanwhile, on June 17th, 1889, while the *riyat* was still in the hands of the Court, the two Rajas, Hari Har Dat and Shankar Dat, executed an agreement (No. 62 of the record) by which Raja Hari Har Dat surrendered all his interest in the estate to his brother Shankar Dat. The second, third and part of the fourth paragraphs treat of the management of the *riyat*, and take away from Raja Hari Har Dat all power of contracting debts binding the *riyat* or of in any way incumbering it, and em-

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power the younger brother to remove Raja Hari Har Dat from the management in case he infringes the agreement. It is also provided that Raja Hari Har Dat is to surrender the position of *lambardar*. Then in the concluding clauses of the fourth paragraph and in the fifth paragraph there is a complete abandonment by Raja Hari Har Dat of all his interest in the estate—except perhaps so far as that Raja Shankar Dat is to pay him Rs. 12,000 per annum for his “personal expenses”—to Raja Shankar Dat, who undertakes to pay the Rs. 12,000 per annum. The reasons given for this surrender are because Hari Har Dat “had spent a great deal of money on account of my personal expenses,” and because the Court of Wards had paid off a sum of nine lakhs of rupees which Hari Har Dat had borrowed and applied to his personal expenses, for which Shankar Dat was “entitled to compensation (to be recouped) which he has not received,” and by the concluding words of the fifth paragraph Raja Hari Har Dat agrees that Shankar Dat is the “absolute owner of my right and share in the state, and that I, Raja Hari Har Dat Dube, have no sort of personal proprietary right to the state property except to manage the same.” These are the material paragraphs of the agreement.

The learned counsel for the appellant contends as to this agreement of June, 1889, that the consideration for it was the payment of the nine lakhs of rupees to Hari Har Dat's creditors, that that was at the time of the agreement a fully executed and not an executory consideration, and that therefore, with the reference to the definition of the word “consideration” in sec. 2 of the Indian Contract Act, that consideration was a bad consideration, and that Raja Shankar Dat took nothing under the agreement. He contends that no express request moving from Hari Har Dat to Shankar Dat had been proved, and that under the circumstances no such request could be inferred or implied.

To this latter contention we cannot accede. It seems to us that when Shankar Dat allowed his interest in the *riyat* to be taken over by the Court of Wards—which the agreement of June 13th, 1879, (No. 61 of the record), clearly shows he did do—it must be

inferred that he did so at the request of Raja Hari Har Dat. It is difficult to see why such a request should not have been made, but it is very easy to understand why such a request must have been made. Shankar Dat, who had not long attained majority, does not appear to have been at all in embarrassed circumstances as far his interest in the *riyat* was concerned. On the other hand, Hari Har Dat was some lakhs of rupees in debt. It was of vital importance to him that the Court of Wards should intervene to save the estate, and that the intervention could in the nature of things have been obtained only on the condition that both the brothers (who, as we shall subsequently show, were joint owners of the estate) should apply to have themselves declared incapable of managing their affairs, and so put it in the power of the Court of Wards to deal with the joint interests as a whole. Had it been necessary first to separate and partition off Shankar Dat's share—a tedious and costly process—the Court of Wards in all probability would have declined to interfere on behalf of Hari Har Dat. And not merely is it to be inferred from the circumstances of the case that a request did move from Hari Har Dat to Shankar Dat, but also, as it appears that Hari Har Dat adopted and enjoyed the benefit of the consideration by his debts being paid off and his creditors getting money, part at least of which should have gone into Shankar Dat's pocket, such a request will be implied by law. It must also be borne in mind on this matter that all through the ten years 1879-1889, Shankar Dat had to live on a small allowance of from Rs. 250 to Rs. 400 per mensem, instead of being able to enjoy the full income of his relatively unembarrassed interest in the *riyat*, that that deprivation of income was still continuing at the date of the agreement of June 1889, and also that at the latter date the Court of Wards was still in possession and was still paying off the debts in pursuance of the consent thereto by Hari Har Dat shown in the agreement of June 13th, 1879. Further, there can be no doubt that, had Shankar Dat on the cessation of the Court of Wards' management desired a partition, he could have demanded an account from his brother, and that in that account he would not have been charged with the enormous debt which the

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waste and extravagance of his brother had caused. The result of such an account would in all probability have shown that Hari Har Dat had squandered the whole of his interest. In the agreement of June 13th, 1879, Rajah Shankar Dat expressly reserves his right to demand such an account, and, that being so, his refraining from suing his brother to recover the loss and damage which that brother's extravagance had entailed on him is in our opinion a good consideration for the agreement of June 17th, 1889. And further there is the promise by Shankar Dat to make his brother the generous allowance of Rs. 12,000 per annum, notwithstanding that in all probability Hari Har Dat had by his extravagance wasted and squandered the whole of his interest in the estate. It appears also that Shankar Dat only intended to take Rs. 12,000 per annum for his own personal expenses out of the estate, desiring probably to allow the remainder to accumulate.

For the appellant it was contended that the Rs. 12,000 per annum were to be Hari Har Dat's remuneration for acting as manager. That in our opinion clearly is not so. The allowance was to be paid to him for his "personal expenses," and, as long as he remained manager, he was to be allowed to pay himself that amount out of the income of the estate. But the agreement empowered Shankar Dat to remove his brother from management. In that event the allowance of Rs. 12,000 was not to cease, but was to be paid by Shankar Dat to his brother, and, as before, for "personal expenses." It is quite out of the question to suppose that Rs. 12,000 were to be paid for anything but Hari Har Dat's support. Bearing the past in mind, his services as manager would have been dearly purchased at even Rs. 5 per month, but Shankar Dat probably hoped that under the strict rules as to the way in which the management was to be conducted, contained in the agreement of June 17th, 1889, Hari Har Dat would do better in future.

For the above reasons we are of opinion that the agreement of June 17th, 1889, was not bad for want of consideration. But, even if such were the case, we should still hold that the agreement might well be supported and held to be a good agreement under the

provision of s. 25 (2) and of s. 70 of the Indian Contract Act. By the agreement Hari Har Dat promised to compensate Shankar for an act which the latter had done for him in allowing his interest in the estate to be taken by the Court of Wards for the purpose of enabling the Court to liquidate Hari Har Dat's debts, and the agreement of June 13th, 1879, shows that Shankar Dat did not intend to perform that act gratuitously. We have no hesitation in holding that a very adequate consideration was given for the agreement of June 17th, 1889, and that Hari Har Dat felt he could not resist the claim which Shankar Dat had in the agreement of June 13th, 1879, reserved to himself the right to enforce.

We accordingly find that the agreement of June 17th, 1889, is a good and valid agreement binding on the parties to it, and from the date of its execution Raja Hari Har Dat ceased to have any longer any proprietary interest in the *riyasat*, of which his brother Shankar Dat from that date became the sole and absolute owner, subject only to the obligation of paying Rs. 12,000 per annum to Hari Har Dat for his personal expenses. Neither the *riyasat* nor Hari Har Dat's former interest in it remained any longer liable for any debt which Hari Har Dat might contract after the date of the agreement.

There is no ground whatever for supposing that this agreement was entered into for the purpose of defrauding creditors. At its date all or nearly all the debts had been paid off by the Court of Wards, and in every one of the many cases connected with this *riyasat*, which up to the present have been before this Bench, the debts had been contracted after the date of the agreement of June 17th, 1889. For that reason therefore, and not because (as the lower Court holds) the appellant had not obtained an attachment or an order for sale before the decree of December 23rd, 1891, we hold that the appellant's decree cannot be executed against the property which the appellant desires to have taken in execution of that decree. As to the compromise of September 4th, 1891, and the decree of December 23rd, 1891, passed in terms of the compromise, we are of opinion that they are immaterial. Indeed the decree is

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only declaratory of the pre-existing title. Raja Shankar Dat's title does not depend on them, or on either of them, but on the agreement of June 1889, by virtue of which he became sole and absolute owner of the *riyat* from June 17th, 1889.

After the above finding it is hardly necessary to enter into the question as to whether Raja Hari Har Dat, and Shankar Dat, were joint in estate; but as the question has been fully argued by the learned counsel on both sides, we think we should express our opinion respecting it. A very few words only are necessary. In our opinion there is not on record a shred of evidence from which it could be inferred that the two brothers were not joint. The only thing put before us was an allegation, not supported by any evidence, that in the village papers of the *riyat* the two brothers were recorded as each holding an eight-annas share in the various villages which make up the *riyat*. Such a record as that, standing by itself and not supported by any evidence of an intention on the part of the proprietors to hold the estate in future in certain definite shares, or by any evidence of a separate holding by each independent of the other, is in our opinion perfectly immaterial. To hold that such an entry of itself amounts almost to conclusive evidence of partition—as was contended here—would put it in the power of any village patwari to work a partition in a Hindu joint family by recording immediately on the death of a proprietor the names of his sons as holding each some fraction of the estate, instead of recording all of them as holding the whole jointly. Now as to the present case it is hardly necessary to say that the presumption of law as to every Hindu family, and especially as to a family the members of which are brothers, is that it is joint, and that it lies on those who allege the contrary to establish their allegation by evidence. Here no assertion has been made as to the time when the two brothers separated. Reliance is placed only on the alleged record in the village papers and on some loose expressions in the agreements of June 1879, and June 1889. But it is in our opinion clearly manifest that the great object of all the members of the family was to keep the *riyat* joint and undivided. Indeed, as already mentioned, they went so far as to claim for it

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the dignity of an impartible *raj*. In the *sulahnamah* of January 2nd, 1875, the *riyat* is treated as the joint property of all three proprietors, the eldest of whom is appointed to be the "*gaddi-nashin*," and the reason for entering into this *sulahnamah* is stated to be with the object of maintaining the *riyat* by preventing partition. The three owners were then certainly joint. It has not been shown that anything happened to change the status of the family up to June 1879, when Exhibit No. 61 was executed. There is nothing to show that Hari Har Dat and Shankar Dat had become separate before 1879, and it is perfectly certain that the Court of Wards took over the estate in 1879 as being the joint property of the two brothers. In the agreement of June 1879, Shankar Dat, whose interest it certainly would have been to separate himself from his brother's liabilities, distinctly declares that the *riyat* is possessed jointly by himself and his brother, and says that the object of the Court of Wards' management was to protect the *riyat*. For the appellant reliance was placed on his statement further on that he and his brother each were proprietors of one moiety; but clearly that statement is made for the purpose, not of indicating any separation, but of explaining that, unless he joined in the application to have his interest in the estate put under the Court, any portion of the estate which might be sold would not fetch a good price. Evidently there was no alteration in the status of the two brothers *inter se* during the ten years of the management of the Court of Wards, and finally in the agreement of June 17th, 1889, they declare that they are owners in equal proportion of the whole *riyat* in "the manner of properties of Hindus" (*bataur jaidud Hanud*). The only oral testimony to which our attention was called was that of one Anand Kishore, an old servant of the family, who, in another execution case, had been called by Raja Shankar Dat to disprove the allegation of separation and partition between him and his brother. Strange to say, the appellant put on the record of this case a copy of the deposition of that witness in the other case (*Peake Allen & Co. v. Raja Shankar Dat and another*) and made it evidence in this case, merely calling Anand Kishore to prove he had made the deposition and letting him be cross-examined

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for respondent. It was objected here that the copy of the deposition could not be looked at as the witness was alive. To that it is sufficient to reply that it was by appellant's own act that the copy of deposition was put on the record and made evidence in this case. As to this deposition of Anand Kishore we need say no more than that it conclusively disproves any idea of a separation between the two brothers.

For the above reasons we are of opinion that the appellant, on whom the burden of proof lay, has failed to prove any separation at any time between the brothers, Hari Har Dat and Shankar Dat, and we find that no separation occurred.

We accordingly, though not for exactly the same reasons as those given by the Court below, dismiss this appeal with costs.

Appeal dismissed.

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February 12.

Before Mr. Justice Knox and Mr. Justice Aikman.

AMBIKA DAT (DEFENDANT) v. RAM UDIT PANDE AND ANOTHER
(PLAINTIFFS).*

Civil Procedure Code, s. 44—Misjoinder—Cause of action—Pre-emption—Zamindari and appurtenant sir-land sold by separate deeds—Suit to pre-empt both zamindari and sir.

Where a zamindari share and the sir-land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the sir-land was not liable to be defeated on the ground of misjoinder of causes of action.

THIS was a suit for pre-emption under the terms of a *wajib-ul-arz*. The plaintiffs were two co-sharers in the village. The defendants were the vendor, who did not oppose the suit, and the vendee, who was a stranger. The plaintiffs alleged that the vendor had on the 20th of January 1892 sold to the vendee defendant a certain zamindari share and also certain sir-land attached thereto in one and the same transaction, but that to avoid claims for pre-emption he had caused two fictitious sale-deeds to be prepared, one relating to the zamindari share and the other to the sir-land, and

* First Appeal No. 110 of 1894, from an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 30th June 1894.

that in both these sale-deeds the price had been stated at more than it really was.

The defendant vendee pleaded *inter alia* that on the plaintiffs' own allegations the suit was bad for misjoinder of causes of action, there being two separate sale-deeds the subject of each of which was different.

The Court of first instance (Munsif of Jaunpur), accepting the contention of the defendant, dismissed the suit *in toto*.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Jaunpur), being of opinion that there was no misjoinder, remanded the suit under s. 562 of the Code of Civil Procedure for trial on the merits.

From this order of remand the defendant vendee appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Jwala Prasad* and Munshi *Kalindi Prasad*, for the respondent.

Knox, J.—This is an appeal from an order whereby the Subordinate Judge of Jaunpur remanded to the Court of first instance under the provisions of s. 562 of the Code of Civil Procedure for trial on the merits a suit in which the Munsif of Jaunpur dismissed the claim of the plaintiffs before him, respondents before us, on the ground that the claim as brought, without any leave of the Court obtained under s. 44, was bad for misjoinder of causes of action. The suit was a suit for the recovery of immovable property, the plaintiffs claiming to have a right of pre-emption over that property. It is true that the property claimed had formed the subject-matter of two distinct deeds of sale to one and the same vendee. Under one deed of sale the zamindari share was sold, and under the second deed of sale the *sir*-lands comprised in the zamindari were sold to the same vendee. The respondents entered in their plaint that their cause of action *quoad* the whole property claimed accrued on the 22nd of January 1892, when they expressed their readiness to buy and were refused. The learned Subordinate Judge was perfectly

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right in holding that this suit was a suit for recovery of immovable property and that no cause of action of a different character had been joined with the suit; in fact, in my opinion there was one and only one cause of action, *i.e.*, the offer made by the respondents, and the refusal which compelled those respondents to bring a suit, and gave them the cause of action on which they came to the Civil Courts. The order passed by the Subordinate Judge was a good order and the appeal will have to be dismissed.

AIKMAN, J.—The appellant in this case, by two separate sale-deeds, executed on the 21st of January 1892, purchased, by one sale-deed the *sér*-land appertaining to a certain zamíndári share, and by the other sale-deed the zamíndári share itself. The idea with which two separate sale-deeds were executed was probably to evade the provisions of ss. 7 and 9 of the N.-W. P. Rent Act (Act No. XII of 1881). The respondents brought a suit to establish a right of pre-emption in respect of this zamíndári share and *sér*-land. The vendee resisted the claim on various grounds, one of which was that, as there had been two separate sale-deeds, the suit was bad owing to misjoinder of causes of action. Without entering into the merits of the case, the Munsif of Jaunpur on this plea dismissed the suit. The plaintiffs appealed to the Subordinate Judge, who set aside the decree of the lower Court and remanded the suit under the provisions of s. 562 of the Code for trial on the merits. Against this order of remand the present appeal is brought by the vendee. In my opinion the learned Subordinate Judge was perfectly right in remanding the suit. Section 45 of the Code of Civil Procedure provides that "subject to the rules contained in chapter II and section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or defendants." Chapter II relates only to the place of suing, and has nothing to do with the present case. Section 44 provides that, except in certain specified cases, no cause of action shall be joined with a suit for the recovery of immovable property, or to obtain a declaration of title to immovable property. The Munsif, in support of his order, says that the case is on all-fours with the case of *Harbans Singh v. Lachmina*

Kuar (1). This case is not in reality on all-fours with the case referred to, for in the latter one pre-emption suit was brought in respect of the sale of properties situate in two different villages, in which possibly the terms of the *wajib-ul-arz* might differ. But even if it had been on all-fours, I find myself unable to hold that the terms of s. 44 apply to this case. In the case of *Chidambara Pillai v. Ramasami Pillai* (2) it was held that s. 44 prohibits, not the joinder of several causes of action entitling a plaintiff to the recovery of immovable property, but a joinder with such causes of action of causes of action of a different character, except as excepted in the section. I quite concur with the interpretation there put upon the provisions of s. 44. Even if the Munsif was right in thinking that s. 44 applied, this was certainly a case in which he should have given leave under that section. The Munsif ignored the desirability of preventing a multiplicity of suits and overlooked the principle which is embodied in the opening section of chapter IV of the Code of Civil Procedure, which deals with the frame of a suit.

I concur in the order proposed by my brother Knox.

The order of the Court will be that the appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

TODAR MAL (PLAINTIFF) v. SAID MUHAMMAD AND OTHERS (DEFENDANTS).*

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February 13.

Civil Procedure Code, s. 174. — Non-attendance of witnesses in obedience to a summons — Lawful excuse.

There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who having been summoned has failed to attend when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued of the necessary expenses of such witness as specified in s. 160 of the Code of Civil Procedure.

THIS was a suit for recovery of possession of a certain bagh, the plaintiff asserting his title to be based, as to one-half, on a purchase at an auction sale in execution of a decree, and as to the other half on a

*Second Appeal No. 507 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 8th March 1894, confirming a decree of Maulvi Muhammad Abbas Ali, Munsif of Etah, dated the 11th January 1893.

(1) Weekly Notes, 1888, p. 230.

(2) I. L. R., 5 Mad. 161.

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private purchase from the owners. The claim was met by the plea of adverse possession,^o the defendants alleging that the plaintiff had in fact never held possession of the bagh within twelve years before suit. The Court of first instance (Munsif of Etah) put the plaintiff to proof of his possession, and finding that he had failed to prove his possession within twelve years prior to the suit dismissed the suit with costs.

The plaintiff appealed, urging (1) that the burden of proof had been wrongly laid by the Court of first instance, (2) that the plaintiff's possession was proved by the evidence on the record and (3) that the Court was wrong in disallowing the plaintiff's application for the summoning of certain witnesses.

The lower appellate Court (Additional Subordinate Judge of Mainpuri) found against the plaintiff-appellant on the three issues raised by his grounds of appeal and dismissed the appeal.

The plaintiff thereupon appealed to the High Court, again urging with greater minuteness his objection in the Court below as to the refusal of the Court to issue a warrant for the arrest of certain witnesses, who had been summoned but had not attended on a date to which the hearing had been adjourned owing to the non-payment by the plaintiff of their diet money and other expenses. The facts relating especially to this part of the case are set forth in detail in the judgment of the Court.

Mr. *H. C. Niblett* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondents.

KNOX and AIKMAN, JJ.—There is but one point for determination in this second appeal. In order to explain that it will be necessary briefly to allude to the procedure adopted by the Court of first instance. The date fixed for the settlement of the issues was, first, the 23rd September, and, again, the 10th November 1892. On the 10th the Court records, as a reason for adjournment, that it has permitted the defendants' pleader to be absent for that pleader's private business, and it therefore adjourned the settlement of issues

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until the 12th. Issues were framed on the 12th November, and the date fixed for the first hearing was the 8th December. Owing to the death of one of the plaintiffs the case was adjourned to the 20th of December, but not until five of the witnesses for the plaintiff had appeared in answer to the summons fixing the 8th December. On the 20th December certain of the witnesses of the plaintiff were again present, but, owing to the illness of the Munsif, the hearing was adjourned until the 11th of January 1893. The witnesses who were present on the 20th were told to attend on the 11th January. On that date, however, two of those witnesses were absent. Instead of proceeding with the witnesses who were present or asking for an adjournment and issue of a fresh summons upon the defaulting witnesses the plaintiff applied to the Court for a warrant of arrest to be issued upon those witnesses. The Court declined to grant such warrant on the ground that the travelling and other expenses of the witnesses had not been paid, a fact which it elicited from the plaintiff himself; it accordingly refused the application and disposed of the suit upon the materials before it. The contention before us is, that the Court was bound to accede to the application made by the plaintiff and to issue a warrant of arrest. It is evident, however, from the provisions of s. 174 of the Code that the Court upon such an application being made to it has discretionary power as to granting or refusing the request, except when the Court has reason to believe that the defaulting witnesses have a lawful excuse for such failure, in which case it is precluded from making an order of arrest. Arguments might be raised as to what does or does not amount to a lawful excuse. From the explanation attached to s. 174, ~~non-payment~~ or non-tender of a sum sufficient to defray the expenses mentioned in s. 160, *viz.*, the travelling or other expenses of the person summoned in passing to and from the Court, and one day's attendance shall be deemed a lawful excuse. The Court had no option after what the plaintiff himself had said but to refuse to issue the warrant of arrest. The pleas taken in the memorandum of appeal entirely fail, and this appeal is dismissed with costs.

Appeal dismissed.

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February 19.

Before Mr. Justice Aikman.

THAKURI (PLAINTIFF) v. KUNDAN AND ANOTHER (DEFENDANTS).*

Practice—Appeal—Decision of Court based upon ground not specifically urged by appellant—Act No. IV of 1882 (Transfer of Property Act) s. 41.

Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.

THE plaintiff, who was the widow of one Chajju, sued for possession of a half share in a certain house on the allegations that the house had been built by her deceased husband and his uncle Khushi jointly and inhabited by them; that after the death of Khushi and Chajju, Murli the son of Khushi had wrongfully mortgaged the whole house in his own name, and that subsequently the house had been brought to sale by the mortgagees. The defendants, auction purchasers, resisted the suit chiefly on the ground that the sole title to the house had been in Khushi and that the plaintiff's husband was separate, and that the plaintiff herself had been out of possession for more than twelve years.

The Court of first instance (Munsif of Muzaffarnagar) found that the house had been built by Khushi and Chajju jointly, and that though the plaintiff had on the death of her husband gone to live with her father's family, she occasionally came to live in the house in dispute, and he gave the plaintiff a decree as claimed.

The defendants, auction purchasers, appealed, and the lower appellate Court (District Judge of Saharanpur), holding that the case was one to which s. 41 of Act No. IV of 1882 would apply, inasmuch as it appeared that Murli the son of Khushi had for some time been left in ostensibly sole ownership of the house, referred two issues based on that section to the Munsif.

The Munsif returned a finding to the effect that Khushi and his son had since the death of Chajju remained in ostensible owner-

Second Appeal No. 576 of 1894, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 15th March 1894, reversing a decree of Maulvi Maula Bakhsh, Munsif of Muzaffarnagar, dated the 26th February 1894.

ship of the house and that there were no circumstances indicating fraud or concealment in the matter of the mortgage by Murli and the subsequent sale.

The lower appellate Court accordingly on the above finding applying s. 41 of Act No. IV of 1892 dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Munshi *Viddya Charan Singh* for the appellant.

Mr. *Abdul Raoof* for the respondents.

AIKMAN, J.—Musammat Thakuri, the appellant in this case, brought a suit for possession of one-half of a dwelling-house. Her case was that the house had been jointly built by her husband Chajju and his uncle Khushi; that after Chajju's death, which took place some 18 or 19 years ago, Khushi's son, Murli, mortgaged the whole of the house to one Chiranji Lal. Chiranji Lal got a decree on his mortgage, in execution of which the house was brought to sale and purchased by the defendants Kundan and Chota, the respondents before me. The Court of first instance (the Munsif of Muzaffarnagar) gave the plaintiff a decree, which was reversed on appeal by the learned District Judge of Sahāraunpur. The learned Judge was of opinion that s. 41 of the Transfer of Property Act applied to the case and referred to the Munsif for trial two issues based on the terms of that section. The finding of the Munsif was in favour of the respondent. In second appeal it is urged that as s. 41 of the Transfer of Property Act was not expressly pleaded, the learned Judge had no power to take it into consideration in disposing of the case. I cannot accede to this contention. The respondents were, *primā facie*, *bonā fide* purchasers for value; and where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. Here it is found that for a long term of years no ostensible act of ownership was exercised by the plaintiff over the house, but that, on the contrary, she allowed her husband's cousin to appear and deal with the

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house as ostensible owner, and that in consequence of his conduct the respondents have been induced to purchase. I observe that plaintiff allowed upwards of four years to elapse from the date of the auction-sale before she took any step to assert her right, and in doing so, although she has made her husband's cousin a defendant to the suit, she has not asked for any relief against him. I think, under the circumstances stated above, the learned Judge was right in dismissing the suit. I dismiss the appeal with costs.

Appeal dismissed.

1895
February 19.

Before Mr. Justice Aikman.

DURGA SINGH (PLAINTIFF) v. NAURANG SINGH (DEFENDANT).

Mortgage—Prior and subsequent mortgagees—Right of prior mortgagees to add to the amount secured by his mortgage outlay incurred in the preservation of the mortgaged property—Act No. IV of 1882 (Transfer of Property Act), s. 53.

Where a mortgagee of agricultural land had with the consent of his mortgagors spent money in repairing a well on the property which had been rendered useless from natural causes, it was *held* that such mortgagee was entitled, in a suit by a subsequent mortgagee against him for redemption, to add the amount so expended to the mortgage-debt to be paid by the plaintiff before he could obtain the decree for redemption claimed by him.

THE plaintiff in this case, being a puisne mortgagee, sued for redemption of a prior mortgage on the property mortgaged to him by payment of Rs. 197. The prior mortgagee admitted that the amount due on the original mortgage was Rs. 197, but pleaded that certain other money was due to him under a subsequent bond and that the plaintiff was also bound, before he could redeem, to pay Rs. 600, the cost of a well which he had, with the permission of his mortgagors, built upon the land for its benefit.

The mortgagors also filed a written statement to the effect that they had given permission to the defendant-mortgagee to build the well, and that the amount claimed by that defendant was correct.

Second Appeal No. 614 of 1894, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 13th April 1894, modifying a decree of Babu Pramotha Nath Banerji, Munsif of Jaunpur, dated the 29th January 1894.

The Court of first instance (Munsif of Jaunpur) found that the money claimed as due on the second bond of the defendant mortgagee was not recoverable, the bond being unregistered, and that, though the defendant might have spent something in repairing the well, he had not given satisfactory evidence of the amount. It accordingly decreed the plaintiff's claim for redemption at Rs. 197.

The defendant mortgagee appealed. The lower appellate Court (Subordinate Judge of Jaunpur) allowed the appellant a sum of Rs. 100, in respect of his claim for the well, to be added to the amount decreed by the first Court.

The plaintiff thereupon appealed to the High Court.

Mr. H. C. Niblett, for the appellant.

Munshi Madho Prasad, for the respondent.

AIKMAN, J.—This was a suit by a puisne mortgagee to redeem the mortgage of a prior mortgagee who was under his mortgage in possession of the mortgaged property, namely, certain agricultural land. The plaintiff paid into Court the amount secured by the prior mortgage. In addition to the sum deposited in Court the prior mortgagee claimed to be entitled to certain other payments, amongst others, to Rs. 600 for the construction of a well. The lower Court (the Subordinate Judge of Jaunpur) has held that the plaintiff, before he can redeem, must pay to the respondent the sum of Rs. 100 on account of the outlay on this well. In second appeal the plaintiff contends that, inasmuch as there was no covenant in the original mortgage-deed to pay more than the mortgaged amount, the defendant was not entitled to any compensation for the repairs of the well. In my opinion this plea is without force. It is impossible to provide in a mortgage-deed for all the accidents that may happen to the property mortgaged.

In the present case it has been held proved that a well which was required for the irrigation of the mortgaged land had been ruined through an inundation of the river Gumti, and that the respondent constructed a new one in its place. The mortgagors, who were parties to the suit, filed a written statement admitting

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that this had been done with their permission. In my opinion whether this new well be looked upon as an accession to the property, and so falling within the provisions of s. 63 of the Transfer of Property Act, or whether the outlay on it be regarded as money necessarily spent in the management or preservation of the mortgaged property, the prior mortgagee is in either case entitled to add to the principal amount of his mortgage such reasonable sum as he may be shown to have expended. This disposes of the first ground of appeal. In the second ground it is urged that, the evidence in regard to the amount of the expenditure being unsatisfactory, nothing at all should have been allowed. This plea I cannot sustain. It is true that accurate accounts have not been filed by the defendant showing the exact amount of his outlay, but the sum which has been decreed to him by the lower appellate Court cannot be deemed to be in any way exorbitant or in excess of his actual outlay. For the above reasons I dismiss this appeal with costs. I extend the time allowed by the lower Court's decree for the payment of the amount found due up to the 1st of June 1895.

Appeal dismissed.

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February 20.

Before Mr. Justice Knox and Mr. Justice Aikman.

MADAN MOHAN LAL AND ANOTHER (DEFENDANTS) v. KANHAI LAL
(PLAINTIFF).*

*Act No. XV of 1877 (Indian Limitation Act) Sch. II, Arts. 57, 120—Limitation—
Loan on security of movable property—Suit to recover money by sale of
property pledged and also from the defendant personally.*

Where a plaintiff who had lent money on the security of movable property sued to recover the money both by sale of the property pledged and also asked for a decree personally against the defendant, should the amount realised by the sale prove insufficient, it was *held* that, so far as the plaintiff prayed for a decree against the defendant personally, art. 57 of the second schedule of Act No. XV of 1877 was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. *Nim Chand Baboo v. Jagabundhu Ghose* (1) followed.

* First Appeal No. 2 of 1894, from an order of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 5th December 1893.

(1) I. L. R., 22 Calc., 21.

THIS was a suit to recover money advanced on a pledge of certain jewelry. The plaintiff prayed for a decree for sale of the jewelry and also for a decree personally against the defendant. The pledge of the jewelry was evidenced by a memorandum signed by the defendant and another person. The suit was brought more than three, but less than six, years from the time when the loan was made.

The defendant pleaded that the suit was barred by limitation, also that the memorandum relied upon by the plaintiff as evidence of the transaction was not properly stamped and was inadmissible.

The Court of first instance (Munsif of Bareilly), holding that the memorandum in question was a bond or promissory note and applying art. 80 of sch. ii of the Indian Limitation Act, 1877, dismissed the suit as barred by time.

The plaintiff appealed. The lower appellate Court (Subordinate Judge), taking the view that the document in question was a mortgage, held that art. 120 applied and that the suit was within time. It accordingly remanded the suit to the Munsif under s. 562 of the Code of Civil Procedure.

From this order of remand the defendant appealed to the High Court.

Mr. *Roshan Lal* for the appellants.

Babu *Jogindro Nath Chaudhri* and *Lala Sheo Charan Lal* for the respondent.

KNOX and AIKMAN, JJ.—This is an appeal from an order passed by the Subordinate Judge of Bareilly in appeal remanding a case under s. 562 of the Civil Procedure Code for trial on the merits. The claim as laid by the plaintiff was to enforce payment of money which had been borrowed from him upon certain jewels which had been pledged with him. The prayer in the plaint, however, is not merely for recovery of money due by sale of the property pledged. There was a further prayer for the recovery of the balance due after sale of the jewelry by proceedings against the persons of

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the defendants, now appellants. The claim was instituted more than three years from the date when the money had been borrowed and the jewelry pledged. The Court of first instance held that the suit was one governed by art. 80 of the second schedule of the Limitation Act of 1877 and dismissed the suit. The Subordinate Judge was of opinion that there was no express article in the Limitation Act applicable to the suit, and therefore applied art. 120. The question before us was considered by the High Court at Calcutta in *Nim Chand Baboo v. Jagabundhu Ghose* (1). The learned Judges who decided that case were of opinion that, so far as the plaint might pray for a decree for the money lent against the defendant personally, it was barred under art. 57; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell, not within art. 57, but within art. 120 of the schedule and was therefore not barred. We agree in the opinion there expressed. While, therefore, we dismiss this appeal, we so far modify the order of the lower appellate Court as to direct the Court of first instance to dispose of the suit on the merits with regard to the remarks made above. The respondents will get their costs.

Appeal dismissed.

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February 25.

Before Mr. Justice Knox and Mr. Justice Aikman.

BHAGWAN DAS (DEFENDANT) v. THE MAHARAJA OF BHARTPUR AND
OTHERS (PLAINTIFFS).*

*Appeal—Order rejecting application for suit to abate—Civil Procedure Code,
s. 366.*

Held that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contemplated by s. 366 of the Code of Civil Procedure and that no appeal would lie therefrom.

The facts of this case are as follows :—

The late Mahārāja of Bhartpur was plaintiff in a suit pending in the Court of the Subordinate Judge of Agra. He died on the

* First Appeal from Order No. 141 of 1894, from an order of Maulvi Aziz-ul-Rahman, Subordinate Judge of Agra, dated the 18th July 1894.

12th of December 1893. An application was made within time to have the name of his successor brought upon the record of the case as plaintiff, and that application was granted. Subsequently, on the 18th of July 1894, application was made by the defendant alleging that the plaintiff's application for substitution had not been presented by any one authorized to act for the claimant, that no vakalatnámah had been filed, and praying that the suit might be declared to have abated. This application was resisted by the Mahárája. The Court found that no vakalatnámah was then on the record, but that there was evidence that a vakalatnámah had been filed when the application for substitution was made, and rejected the defendant's application.

The defendant thereupon appealed to the High Court.

Babu Durga Charan Banerji for the appellant.

Mr. T. Conlan, Pandit *Sundar Lal* and *Lala Sheo Charan Lal* for the defendants.

KNOX and ATKMAN, JJ.—Upon this appeal being called on for hearing, two preliminary objections were raised by the learned vakíl who appears in the case on behalf of the present ruling Chief of Bhartpur, one of the respondents, plaintiff in the Court of first instance. The first is to the effect that no copy of the decree was filed with the memorandum of appeal and none has been filed up to the present date. The second is to the effect that no appeal lies at all.

It appears that the suit was instituted by the late Mahárája of Bhartpur. He died on the 12th of December, 1890, while the suit was still pending. On the 26th of March, 1894, the present Mahárája applied to the Court to have his name entered on the record in the place of the deceased plaintiff, and an order was passed to that effect. On the 18th of July, 1894, an application was presented on behalf of the defendants alleging that the application of the 26th of March, 1894 was an application made by a person who was not authorized to apply and asking that the suit should abate. The Court refused this application made by the defendants and

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allowed the suit to proceed; and it is from this last order that the present appeal is brought. It is contended that the order falls within the second paragraph of s. 366 of the Code of Civil Procedure, and is therefore appealable under clause 18 of s. 588. We cannot allow this contention. The application of the defendants was not an application contemplated by the second paragraph of s. 366. No appeal lies, and, without pronouncing on the first preliminary objection and acting upon the second, we dismiss this appeal with costs.

Appeal dismissed.

1895.
February 25.

Before Mr. Justice Knox and Mr. Justice Aikman.

BARKAT-UN-NISSA (DEFENDANT) v. MUHAMMAD ASAD ALI (PLAINTIFF).*

Civil Procedure Code, s. 53—Amendment of plaint—Pre-emption—Area of property claimed in suit for pre-emption described as less than true area—Limitation.

A Court is not precluded from returning a plaint for amendment because at the time it is returned for amendment the period of limitation for the suit may have expired.

The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality. *Held* that the Court had power and ought to have allowed the plaint to be amended and that the amendment was not precluded by the fact that the limitation for the suit had expired. *Held* also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold.

This was a suit for possession of a 2 biswas, 9 biswansis share of a certain village, by right of pre-emption, on the allegations that the plaintiff was entitled to pre-emption under the *wajib-ul-arz*, that the defendant-vendor sold the property in suit on the 22nd of October 1892, at a price of Rs. 1,400 to the defendant-vendee, the price being falsely stated in the sale-deed at Rs. 2,000, and that the

*First Appeal No. 120 of 1894, from an order of H. B. Finlay, Esq., District Judge of Sháhjahánpur, dated the 8th August 1894.

plaintiff on coming to know of the sale made a demand of pre-emption but was refused.

The defendant vendee pleaded that she had an equal right of pre-emption with the plaintiff, that the *wajib-ul-arz* was not applicable, that no demand was made by the plaintiff, that the price was Rs. 2,000, that the plaintiff had refused to purchase, and that the claim of the plaintiff was for a part only of property sold. The other defendant did not oppose the suit.

The Court of first instance (Subordinate Judge of Sháhjahánpur) held that the plaintiff had omitted to claim for a small fraction of the share sold and that the plaint could not, more than a year having elapsed since the cause of action accrued, be amended, and dismissed the suit.

On appeal by the plaintiff the lower appellate Court (District Judge of Sháhjahánpur) held that the omission in the plaint was not intentional, but due to a clerical error merely, and that the Court below had power, and ought to have exercised it, to allow the plaintiff to amend. It accordingly remanded the case under s. 562 of the Code of Civil Procedure for trial upon the merits.

From this order of remand the vendee defendant appealed to the High Court.

Mr. *Abdul Majid* for the appellant.

Maulvi *Ghulam Muftaba* for the respondent.

KNOX and AIKMAN, JJ.—This is a first appeal from an order passed by the District Judge of Sháhjahánpur whereby that Judge remanded the suit out of which the appeal before him arose under s. 562 of the Code of Civil Procedure for decision upon its merits. The suit is what is known as a pre-emption suit. Muhammad Asad Ali, the respondent here, was plaintiff: he sued to enforce a right of pre-emption which he claimed over certain property which had been sold by one Muazziz Ali, one of the defendants to the suit, to Musammat Barkat-un-nissa, a second defendant and appellant here. In the plaint under which the suit was instituted the respondent set out in the recital of facts that the share sold by Muazziz Ali to the

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appellant was a 2 biswas 9 biswansis share. In his prayer for relief he also stated the share as being a 2 biswas 9 biswansis share. In point of fact, as admitted by both parties to this appeal, the property which was sold was not a 2 biswas 9 biswansis share, but a share amounting 2 biswas, 9 biswansis, 15 kachwansis, 11 nanwansis and 2 tanwansis. The portion which was omitted was thus but a small fraction of the whole amount of the property which formed the subject-matter of the bargain between Muazziz Ali and the appellant. The learned Judge held that in the interests of justice permission should have been given to the respondent to amend his plaint so as to include along with the property claimed the fractional share which had been omitted. It appears that the respondent on discovering that he had omitted to claim the whole of the property asked for leave to amend his plaint so as to include the whole bargain, but his prayer was refused. In appeal before us it is contended that the Court of first instance was, and is, precluded from permitting the plaint to be amended, because by so doing it would virtually extend the period allowed by law within which a pre-emption suit can be instituted, and that the omission by the respondent to claim a portion of the property which was sold prevents him from enforcing his right over any part of the property and renders his suit liable to dismissal. In support of the first contention we were referred to the case of *Jinti Prasad v. Bachu Singh* (1). That case, however, was of an entirely different character, and the point which arose for decision there is in no way connected with that which we are called upon to decide in the present appeal. The case of *Jinti Prasad* was one in which the plaint presented before a Court of first instance was written upon paper insufficiently stamped and permission was given by the Court before which the plaint was filed to make up the deficiency. The period of grace allowed by the Court extended beyond the time within which the suit could have been instituted. It was held (*vide* p. 70) that "a plaint is a document within the meaning of the Court-fees Act and within the meaning of s. 28, and as a suit can only be instituted by the presentation of a plaint, the presentation

(1) I. L. R., 15 All., 65.

of an insufficiently stamped document, which if sufficiently stamped could be treated as a plaint, cannot be regarded in law as the institution of a suit within the meaning of the explanation to s. 4 of the Indian Limitation Act, 1877, or of s. 48 of the Code of Civil Procedure. Section 28 of the Court-fees Act prohibits the Court from regarding any document which ought to be stamped under that Act as of any validity unless and until it is properly stamped."

In the case before us the suit as brought was undoubtedly instituted within time and no question of sufficiency of stamp arises. The whole tenor of the plaint, and we have examined it carefully, satisfies us that the intention of the respondent was to institute a claim for the whole of the property sold to the appellant: it was merely from inadvertence or some other similar cause that he left out of his plaint the small fractional share which has been set out above. The question before us is—is a Court precluded from returning a plaint for amendment if at the time when it is returned for amendment the period of limitation of the suit may have expired?

The section of the Code which authorizes a Court to return plaints for amendment is s. 53. That section empowers a Court at any time before judgment to let a plaint be amended upon such terms as to the payment of costs as the Court thinks fit. Only one circumstance is set out as being a circumstance under which a plaint should not be amended either by a party or by a Court, and that is when the amendment would convert a suit of one character into a suit of another and inconsistent character. Does that circumstance arise in the present case? The suit as instituted was a suit to enforce a right of pre-emption over a 2 biswas 9 biswansis share: the suit as amended would be to enforce the same right of pre-emption over the same 2 biswas 9 biswansis share *plus* a small fraction. It cannot be said with any show of reason that by the addition of this fractional share the suit brought will be converted into a suit of another and inconsistent character.

As regards the second contention, the case before us is not one in which the pre-emptor is seeking to break up the bargain, or to

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pick and choose out of the property which has been sold. The learned pleader for the appellant referred us to the case of *Muhammad Vilayat Ali Khan v. Abdul Rab* (1). That was a case not at all in accord with the present case. The reason why the would-be pre-emptor in that suit lost his suit for pre-emption was that he had by his conduct acted in such a way as to lead the parties to the bargain to conclude that he would not be the purchaser of any portion of the property sold. We are satisfied that in the present case, and from the very first, the respondent wished to purchase the whole of the property which was for sale. Both the pleas taken in appeal fail and the appeal before us is dismissed with costs.

Appeal dismissed.

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February 27

Before Mr. Justice Knox and Mr. Justice Aikman.

GHULAM MUHAMMAD (DEFENDANT) v. THE HIMALAYA BANK, "LIMITED,"
IN LIQUIDATION, THROUGH THE OFFICIAL LIQUIDATOR (PLAINTIFF).*

Plaint—Form of plaint in suit by Company in liquidation—Amendment Civil Procedure Code, s. 53—Act No. VI of 1882, (Indian Companies' Act), s. 144.

Held that a plaint in a suit by a Bank in liquidation in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in liquidation," and which was also subscribed and verified in the same terms was not a valid plaint having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Court.

Mr. *Roshan Lal* and Mr. *J. Simeon* for appellant.

The respondent was not represented.

KNOX and AIKMAN JJ.—This is a first appeal from an order passed by the District Judge of Saharanpur whereby he set aside a

First Appeal No. 146 of 1894, from an order of H. Bateman, Esq., District Judge of Saharanpur, dated 10th September 1894.

(1) I. L. R., 11 All. 108.

(2) L. R. 18 Q. B. D. 446.

decree of the Small Cause Court Judge passed in his capacity of Subordinate Judge and remanded the case for re-trial on the merits under s. 562 of the Code of Civil Procedure. The appellant was defendant in the Court of first instance and the suit brought against him was instituted, as set forth in the plaint, by the "Official Liquidator, Himalaya Bank, Limited, in liquidation, plaintiff." The plaint was also subscribed and verified in the same terms. No written statement seems to have been filed, but it appears that objection was taken by the defendant to the form of the suit on the ground that the present plaintiff had no *locus standi*, and the suit should have been instituted in the name of the Himalaya Bank. Upon this an issue was framed as to whether the suit was correct in form. The Subordinate Judge, holding that the form of the suit was wrong, dismissed the plaintiff's claim with costs. The lower appellate Court had the same question raised before it in appeal. The Court considered it to be straw-splitting to dismiss a suit because the suit was laid in the wrong form. In any case it considered that the plaint ought to have been returned for amendment or to have been amended by the Court itself under s. 53 cl. (e) of the Code of Civil Procedure. It accordingly remanded the case for re-trial and added the words—"The lower Court can amend the plaint as suggested above, if it thinks fit to do so." In our opinion the lower appellate Court was wrong in thus holding. The terms of s. 144 of the Indian Companies' Act, 1882, authorize an official liquidator with the sanction of the Court to bring or defend any suit in the name and on behalf of the company. This requirement is distinctly of a formal nature, and a substantial compliance with it is insufficient. In the very same section power is given to the official liquidator to do certain acts in his official name. When such official liquidator is acting in the name and on behalf of the company, it is the company and not the official liquidator who is plaintiff. If we were to authorize an amendment in the case before us, it would not be a mere clerical amendment; it would be the substitution of a person who up to the present moment has never been plaintiff in the suit in place of the person who did in fact sue. Moreover, in the present case it would

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be permitting a plaintiff whose suit has become barred by limitation to bring the suit so barred, and would be in contravention of the principle laid down in s. 22 of Act No. XV of 1877. The point before us was considered in *In re Winterbottom* (1). In that case Cave, J. observed :—"Although I have struggled against the conclusion, feeling as I do that the debtor has in no way been misled, as appears from his affidavit, yet I have ultimately come to the conclusion that the requirement of the law has not been complied with, and that the proceeding is a proceeding taken in the name of Nicholson, Liquidator, and not the name of the company." So in the present case we have unwillingly come to the conclusion that the suit before us is one in which the plaintiff is the official liquidator and not the Himalaya Bank, Limited, the only person who has a right of action against the appellant.

The appeal must be allowed. We set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate Court.

Appeal decreed.

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FULL BENCH.

Before Sir John Edge, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BHAGWAN SINGH, MINOR, UNDER THE GUARDIANSHIP OF MUSAMMAT SUGHERI KUAR (DEFENDANT) v. BHAGWAN SINGH AND OTHERS (PLAINTIFFS).*

Hindu law—Benares School—Adoption—Adoption by one of the regenerate classes of a mother's sister's son.

Held by EDGE, C. J., KNOX, BLAIR and BURKITT, JJ., (BANERJI and AIKMAN, JJ., dissenting).

The Hindu law of the School of Benares does not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the onus of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal.

* First Appeal No. 301 of 1892, from the decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 23rd September 1892.

(1) L. R. 18 Q. B. D. 446.

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The authority in the School of Benares of the Dattaka Mimansa of Nanda Pandita considered. That Mimansa is not on questions of adoption an "infallible guide" in the School of Benares, and is not followed when it imposes on the right of adoption restrictions not to be found in the recognised authorities of the School of Benares.

Held by BANERJI, J. (AIKMAN, J. concurring):—The adoption by a Hindu belonging to one of the three regenerate classes of his mother's sister's son is prohibited according to the Hindu law of the Benares School. Such prohibition is not merely directory, but the adoption is absolutely interdicted and void, and cannot be validated by the rule of *factum valet*.

Held also by BANERJI, J.:—That the Dattaka Chandrika and the Dattaka Mimansa are works of paramount authority on questions relating to adoption, as well in those parts of India which are governed by the law of the Benares School as elsewhere.

THIS was a reference to the Full Bench of an appeal in which the substantial question involved was whether the adoption by a Hindu belonging to one of the three regenerate classes (a Kshatriya) and subject to the law of the Mitakshara, or Benares, School of Hindu law of the son of his mother's sister was, according to that law, a valid adoption or not. The facts of the case out of which the reference arose, and the arguments in support of either view of the question, are stated very fully in the judgment of Edge, C. J.; they are also stated in the judgment of Banerji, J.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *T. Conlan*, Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondents.

BANERJI, J.—The suit in which this appeal has arisen was brought by the respondents for the establishment of their right as reversioners to the estate of one Madho Singh, and for a declaration that the alleged adoption of the appellant by Madho Singh was void and ineffectual. One of the grounds on which the alleged adoption was impeached was that the appellant was the son of the sister of Madho Singh's mother. The Court below having held the adoption alleged by the appellant to be invalid, this appeal has been preferred, and the only question which we have to consider and

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determine is whether the adoption of the mother's sister's son by a person belonging to one of the three regenerate classes is valid according to Hindu law. The parties are Thakurs, that is, members of the regenerate class of *Kshatriyas*. It is not alleged that an adoption such as has been set up in this case is valid according to any special custom prevailing in the caste or in the locality to which the parties belong. The case, therefore, must be decided solely with reference to the rules of Hindu law which govern adoption, and independently of any positive custom other than such as may be presumed to be in existence consistently with Hindu law.

It is not disputed, and indeed it was conceded in argument, that the principles which apply to the question of the adoption of a daughter's son or a sister's son apply equally to the adoption of the mother's sister's son, and that if the adoption of a daughter's son or a sister's son is void among the three higher classes, it is equally void in the case of the mother's sister's son. I may also observe that as regards the present question there is no divergence between the Mitakshara School and the other schools of Hindu law, or between the different sections of the Mitakshara School, and that the rules of law affecting the present question are alike applicable to the different schools. There is also no difference as regards the application of those rules between Brahmans, Kshatriyas, and Vaisyas. It is important to bear these facts in mind in considering the question which we have to decide upon this reference.

The question is one of great importance, affecting as it does a large section of the Hindu community, and in determining it I shall consider, first, the authority of decided cases; secondly, the authority of modern writers on Hindu law, European and native; and thirdly, the authority of the *Dharma Sastras*, including that of commentators. I attach the greatest importance to the authority of decided cases, because if they have been uniform and consistent, and have extended over a long series of years, the presumption, in my opinion, arises that they have been submitted to and accepted as correctly laying down the law on the subject, and that

the usages of the people have been regulated in accordance with them. The rule of *stare decisis* has always been regarded as a very salutary rule, and it should, in my judgment, be applied even to questions of Hindu law, unless it can be shown that the consensus of opinions expressed in the decided cases was based on a grossly erroneous interpretation of the law, or on a total misconception of what the law really is,—a misconception induced by erroneous translations of original texts inaccessible to the Judges, and misrepresentations as to their true meaning and scope. I would go further and hold that even if in some instances the rulings may have been founded on doubtful authorities, they should not, if they have been uniform, and have covered a long period of time, be departed from, even at the risk of perpetuating an error, provided that the error was not so gross and clear as to negative the presumption of acquiescence and usage to which I have referred above. "For" to quote the words of Dr. (now Mr. Justice) Gurnu Das Banerji (Tagore Law Lectures for 1879, p. 16) "though it is wrong to perpetuate an error, it would hardly be right to rectify the error by unsettling the law and overruling a precedent which might have long been the basis of men's expectations and conduct." This principle was adopted by a recent Full Bench of the Bombay High Court in *Waman Raghupati Bora v. Krishnaji Kashiraj Bora* (1) where the learned Judges refused to reconsider the question of the authority of the Dattaka Mimansa and the Dattaka Chandrika as high authorities on the subject of adoption, with a view to secure uniformity of decisions; and they refused to reconsider a previous Full Bench ruling on the ground that for the past ten years the decision of the Full Bench had been regarded by the legal profession as having settled the law on the subject. In *Parbati v. Sundar* (2) Pethe-ram, C.J. and Brodhurst, J., were of opinion that they were "bound to follow the authority of a long and uniform course of decisions" on the question of the validity of the adoption of a sister's son. And in the case of *Tulshi Ram v. Bihari Lal* (3) the present learned Chief Justice of this Court decided against the

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(1) I. L. R., 14 Bom., 249. (2) I. L. R., 8 All., 1.

(3) I. L. R., 12 All., 328.

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validity of an adoption made by a Hindu widow without the express permission of her husband on the ground that "having regard to the fact that the texts of the early commentators are more or less in conflict, to the fact that no single case which arose in the North-Western Provinces, in Oudh, or in those districts in Lower Bengal in which the Benares School is followed" had been cited in support of the validity of such an adoption, and having regard to the four cases cited "he would expect that any one who would now contend that a Hindu widow subject to the Benares School could make a valid adoption to her deceased husband without express authority given by him, would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was, in the particular district, recognised as valid by those subject to the Benares School." These observations of the learned Chief Justice apply, in my opinion, with equal force to the present question; and if on this question there exists a long and uniform course of decisions declaring an adoption such as the one set up in this case to be invalid, a Court should, in the words of the learned Chief Justice, expect any one who would now contend that such an adoption is valid to support that contention by clear proof of general usage in the particular district that such an adoption was, in the particular district, recognised as valid.

Bearing these weighty observations of the learned Chief Justice in mind, I will consider the decided cases on the subject which have been cited to us or which I have been able to lay my hands upon. I may remark that the learned vakil who argued the case for the appellant with much ability frankly admitted that with the exception of two cases, and probably a third, to which I shall presently refer, the authority of decided cases in these Provinces, in Bengal, in Madras and in Bombay, had been uniformly against him since the year 1815.

The first case is that of *Doe dem Kora Shankho Takoor v. Bebee Munnee* (1), decided in Bengal on 24th November 1815, in which it was held that a Hindu Brahman cannot adopt his sister's son, as

(1) 1 Morley, 18: S.C. East, case 20.

it imports incest. It appears from the names of the parties that this was a case between persons governed by the Mitakshara law.

The next case arose in these provinces, and is that of *Shiblall v. Bishumber* (1) in which Ross and Roberts, JJ., held the adoption of a sister's son to be invalid.

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In *Battas Kuar v. Luchman Singh* (2), it was held by Pearson and Spankie, JJ., in 1875, that the adoption of her brother's son by a widow was invalid. This ruling proceeds on the same principle which applies to the adoption of a daughter's son, a sister's son, or a mother's sister's son, and is an authority for holding that the adoption of the persons last named is void among the three higher classes. The correctness of this ruling has been doubted, and Mr. Mayne in his well-known work on Hindu Law and Usage (§ 125) thinks that the effect of the doctrine laid down in it "is to introduce into the Hindu theory of adoption a second fiction for which there is no foundation." With reference to Mr. Mayne's observations I shall only quote the remarks made by Mr. Siromani in his Commentaries on Hindu law. At page 166 (Second Edition) he says:—"If the learned author knew even the elementary canons of our religious observances he could not have made the erroneous assertions contained in his observations." Adoption being both to the husband and the wife, and an adopted son being as much the son of the wife as of the husband, it is asserted by those who dispute the validity of such an adoption that the test of eligibility according to the rule of *Niyoga* and incongruous relationship (*virudha sambandha*) applies also to the case of an adoption by a female, she being in such case the author of the act of adoption. It is not necessary, however, to enter into a consideration of this question at present and it is immaterial for present purposes whether the ruling is correct or erroneous. There may certainly be two opinions in regard to it. That ruling, however, may fairly be regarded as an authority for the principle on which the adoption in this suit is alleged to be invalid.

(1) S.D.A., N.-W. P. 1866, p. 25. (2) 7 N.-W. P., H. C. Rep., 117.

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In *Parbati v. Sundar* (1), Petheram, C. J. and Brodhurst, J., held in 1885 that a Brahman cannot validly adopt his sister's son. The learned Judges, as I have said above, refused "to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point."

This case was appealed to Her Majesty in Council. Their Lordships decided the appeal on other grounds—*Sundar v. Parbati* (2),—but on the question of adoption they expressed themselves as follows:—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son" (p. 56). This is a very strong expression of opinion, and although for the purposes of the case before their Lordships it was *obiter*, this expression of opinion, coming as it does from the highest tribunal, is entitled to the greatest weight.

I have not referred to the case of *Luchmee Nauth Rao Naik Kaleya v. Musammatt Bhina Baee* (3) because, although in that case the Pandit expressed the opinion that the adoption of a sister's son was invalid, the question was not decided by the Court, as the case was disposed of on other grounds.

The only cases in Upper India in which it is said a contrary view was held were: (i) *Ram Chunder Chatterjea v. Sumboo Chunder Chatterjea*, (4) decided in Bengal in August 1810; (ii) a case from the District of Mirzapur, decided on 18th July 1808, being case No. XII in Sir William Macnaghten's *Principles and Precedents of Hindu Law*, Vol. II, p. 185; and (iii) *Chowdree Purnmessur Dutt Jha v. Hunooman Dutt Roy* (5), decided on 18th December 1837. In the first of these cases the adoption of his sister's son by a Brahman was held to be valid, but according to Sir Francis Macnaghten the doctrine which prevailed in that case was overruled by a subsequent proceeding in the Supreme Court (see *Considerations on Hindu Law*,

(1) I.L.R., 8. All., 1.

(3) 7 S.D.A., N.-W. P., 441.

(2) I.L.R., 12 All., 51.

(4) 1 Morley, 18.

(5) 1 Morley, 19.

pp. 166, 168) : so that the authority of that case has ceased to be of any value. As for the second case referred to above, Sir William Macnaghten was of opinion that it was a case of *Sudras*. The question put to the pandits was whether a daughter's son who had been adopted by his maternal grandfather was entitled to inherit the estate of the maternal grandfather either as his adopted son or as his daughter's son in preference to his brother and nephews. From the nature of the question put and the answers given, it is evident that the adoption was assumed to be valid, and no question arose as to the validity of the adoption. It does not appear whether the case was one between members of the three higher classes, and as the validity of the adoption was not questioned, Sir William Macnaghten was justified in his conclusion that the parties were *Sudras*, among whom such an adoption is admittedly valid. This case cannot therefore be regarded as an authority in support of the validity of an adoption like the one in question. There is no reason for assuming that the case was not one among *Sudras*. Had the parties concerned in it belonged to the three superior classes, the probabilities are very great that the validity of the adoption would have been called into question. Taking the case in the light most favourable to the appellant, it is not an authority one way or the other. The third case mentioned above was that of the adoption of a sister's son in the *Kritrima* form. As an adoption in that form varies in important particulars from an adoption in the *Dattaka* form, that case is no authority on the question with which we have to deal. It is thus clear that except in one case, which was a case between persons governed by the Dayabhaga and not the Benares school, and which, again, was apparently overruled in subsequent proceedings, it has been uniformly held by the Courts in Upper India since 1815, that the adoption of a person related to the adopter in the way in which the appellant was related to Madho Singh is invalid.

Turning to the Presidencies of Madras and Bombay we find that it was held in *Narasamma v. Bala Ram Charlu* (1) that the adoption of a sister's son was invalid ; that in *Jivani Bhai v. Jivani Bhai* (2)

(1) 1 Mad., H. C. Rep., 420.

(2) 2 Mad., H. C. Rep., 462.

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and *Gopalayyan v. Raghupati Ayyan* (1) a similar decision was arrived at; that in *Minakshi v. Ramanada* (2) a Full Bench held that "it is the general rule of Hindu law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted in her maiden state." The cases of *Vishnu v. Krishna* (3); *Vayidinada v. Appu* (4), and *Viroyya v. Hanumanta* (5), referred to by the learned vakil for the appellant, were decided on the ground of the existence of a special usage sanctioning the adoption in question in each of those cases.

The case of *Ramalinga Pillai v. Sadasiva Pillai* (6) was decided by their Lordships of the Privy Council on the ground that the adoption of the respondent had been admitted by the appellant. The marginal note in the report is misleading, as the case was one really of Sudras and not of Vaisyas [see *Jivani Bhai v. Jivu Bhai*, (7)]. This case is therefore no authority on the question before us.

In Bombay, so far back as 1821, the Sastris declared in the case of *Haebut hao Mankur v. Gobind Rao Balwant Rao Mankur* (8) (cited in West and Bühler's Hindu Law, p. 1027) a son of a daughter, a sister or a mother's sister to be ineligible for adoption except among Sudras. In *Gopil Narhar Safray v. Hanwant Ganesh Safray* (9) it was held that Brahmans, Kshatriyas and Vaisyas "are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or the son of any other woman whom they could not marry by reason of propinquity." All the previous cases were cited and considered and they showed a consensus of opinion on that side of India on the point. This case was followed in *Bhagirthi Bai v. Radha Bai* (10). The only case in which a contrary opinion was expressed was that of *Ganpat Rav Vireshvar v. Vithoba Khandappa* (11) in which the parties were Vaisyas; but

(1) 7 Mad., H. C. Rep., 260.

(2) I. L. R., 11 Mad., 49.

(3) I. L. R. 7 Mad., 3.

(4) I. L. R., 9 Mad., 44.

(5) I. L. R., 14 Mad., 459.

(6) 9 Moo. I. A., 506.

(7) 2 Mad., H. C. Rep., 462.

(8) 2 Borrodaile, 106.

(9) I. L. R., 3 Bom., 273.

(10) I. L. R., 3 Bom., 298.

(11) 4 Bom., H. C. Rep., 130. A.C.J.

the judgment was based solely on the decision of the Privy Council in *Ramalinga Pillai v. Sadasiva Pillai* (1) referred to above, which was really a case of Sudras; so that the ruling last referred to was founded on a misconception and was clearly erroneous.

We have thus, as Mr. Mayne says (§128), "a singularly strong series of authorities in all parts of India forbidding the adoption of the son of a daughter, a sister or of an aunt." From a comparison of the reported cases it appears that the cases affecting the present question were more numerous in the Southern Presidencies than in Upper India. It is a well-known fact that the rules of marriage and adoption are more lax in Southern and Western India than in these Provinces, and consequently usages of marriage and adoption have come into vogue in those presidencies which have given rise in those presidencies to a larger amount of litigation involving questions of adoption than in Upper India. It has been truly observed by Mr. Mayne (§92) that "the effect that every adoption must have upon the devolution of property causes every case that can be disputed to be brought into Court. Notwithstanding the spiritual benefits which are supposed to follow from the practice (of adoption) it is doubtful whether it would ever be heard of if an adopted son was not also an heir. Paupers have souls to be saved, but they are not in the habit of adopting." The uniformity of decisions on the question of the validity of the adoption of a daughter's son, a sister's son or the son of an aunt, and the paucity of cases in which such decisions were given in Upper India, raise, in my opinion, the irresistible inference that such adoptions are rare, if not unknown, and that the usage of the Hindus of these provinces is to regard such adoptions as invalid and not to resort to them. Had such adoptions been common or numerous there would undoubtedly have been a large amount of litigation in connection with them. As every adoption had the effect of diverting the devolution of property from its ordinary channel every person who would otherwise have succeeded to the property which passed into the hands of the adopted son, would undoubtedly have

(1) 9 Moo. I. A., 506.

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contested the validity of the adoption and the right set up by the adopted son. Not a single case in these provinces has been brought to our notice in which such an adoption was held to be valid, and in the few cases which apparently went into Court it was held to be invalid. It is from a similar absence of rulings validating an adoption in a similar case, and the existence in that case of rulings declaring the adoption to be void, that in *Tulshi Ram v. Bihari Lal* (1) a similar inference was drawn by the learned Chief Justice and the other learned Judges of this Court. As in my judgment it may be fairly inferred that the usage of the people of these Provinces is in accordance with the doctrine uniformly laid down by the Courts ever since 1815, and that that doctrine has thus received the sanction of usage, the duty of a Judge in this country, as laid down by their Lordships of the Privy Council, is plain. In *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2) their Lordships said (at page 436) :—"The duty, therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." Having regard to these observations of their Lordships, it is our duty to give effect to the usage which, in my judgment, must be inferred to exist in these provinces, and it is not necessary to consider whether the usage has the sanction of the texts of Hindu law.

It is a fact which does not admit of question that the right of adoption is not, according to Hindu law, a right unrestricted by limitations. On the contrary, that law imposes on the right of adoption various and important limitations as to the capacity of the person adopting, of the person giving in adoption, and of the person taken in adoption; and when any of those capacities is absent or defective an adoption is void according to that law. Where, therefore,

(1) I.L.R., 12 All., 328.

(2) 12 Moo. I.A., 397

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an adoption, which is alleged to be valid, is set up in opposition to the right of succession of a person who would, in the absence of an adoption, succeed to the property of a deceased person, the validity of that adoption should, in my opinion, be established by the person who sets up the adoption, and the issue is not on the person who asserts the contrary. Where, as in this case, a uniform course of rulings has pronounced against the validity of an adoption like the one in question, and has thus given rise to an inference of usage, albeit the texts and commentaries may be conflicting, any one asserting such an adoption to be valid must found his assertion on the basis of a specific usage to the contrary, which he must clearly establish. It is, I conceive, a usage of this description to which their Lordships of the Privy Council referred, and it does not seem to me that their Lordships meant to lay down that every disputed question of Hindu law should be decided solely with reference to usage. It has not been alleged in this case that a usage obtains among persons of the class to which the parties to this suit belong or in the particular locality in which this suit has arisen which validates the adoption set up by the appellant.

It may be that a contrary usage prevails in the Western and Southern Presidencies. Having regard to the fact that the rules of marriage and adoption are lax in those presidencies, and are not so strictly enforced there as they are in these provinces (see West and Bühler, p. 888, and I. L. R. 9, All., p. 328), to the fact, for example, that a marriage between the children of a brother and a sister is common in the South, whilst such a marriage is regarded as incestuous in these provinces and is wholly unknown among Hindus of the higher castes, it is not surprising that such a custom should exist in those presidencies. It may also be that a similar custom prevails in the Punjab, but there is nothing to suggest that it obtains in these provinces or in that portion of Lower Bengal which is governed by the Benares School of Hindu law. Mr. Golap Chandra Sarkar's assertion (Tagore Law Lectures, 1888, p. 335) that instances of the adoption of a daughter's son or sister's son among the Brahmans of Bengal are not rare is, as far

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as I am aware, not well founded; and I have the authority of a late eminent Hindu Judge of the Calcutta High Court to say that not only is such adoption unknown among the Brahmans of Bengal, but it is rare even among Sudras. In these provinces, except among Jains, who are not ordinarily governed by the Mitakshara law, and who have a special custom of their own, the adoption of a daughter's son or sister's son or a mother's sister's son among the three higher classes, is, as far as my judicial experience goes, uncommon; and in the course of my experience as a judicial officer in these provinces, extending over a period of twenty-three years, I cannot call to mind a single instance, except the present case, in which such an adoption among the three higher castes was alleged to have taken place or was asserted to be valid. The non-existence of any reported case in these provinces in which an adoption of this description was held to be valid, the existence of a uniform and long course of decisions in which such an adoption has been held to be invalid, and the paucity of cases in which the validity of such an adoption was questioned, in my opinion, raise, as I have said in another part of this judgment, the inference of a usage in conformity with the rulings. As it has not been asserted in this case that a contrary usage exists among the particular class or in the particular locality to which the parties to this suit belong, we are, in my judgment, bound to hold, in accordance with the long and uniform course of rulings in all parts of India, that the appellant's adoption was invalid. Having regard to those rulings, to the almost total absence of a conflict of authorities based on reported cases, and to the strong expression of the opinion of their Lordships of the Privy Council on the point in the case of *Sundar v. Parbati* (1) the question can no longer be regarded as *res integra*.

Assuming that the question is still an open one, the next point to be considered is whether the case-law on the subject, to which I have referred above, is in accordance with the rules of Hindu law. That they are in accordance with the authority of modern European text-writers on Hindu law is undoubted, and is indeed

(1) I. L. R., 12 All., 51.

conceded. The rule relating to the capacity of the person to be adopted is thus stated in Mayne's Hindu Law and Usage, § 123 (5th edition, p.p 141 and 142):—"The restrictions upon the selection of a person for adoption appear . . . to rest upon the theory, that as the object of adoption was the performance of religious rites to deceased ancestors, the fiction of sonship must be as close as possible. Hence, in the first place, the nearest male sapinda should be selected, if suitable in other respects, and if possible a brother's son, as he was already in contemplation of law a son to his uncle. If no such near sapinda was available, then one who was more remote; or in default of any such, then one who was of a family which followed the same spiritual guide, or, in the case of Sudras, any member of the caste. . . . In the second place, no one can be adopted whose mother the adopted (*sic.* adopter) could not have legally married." "The rule so laid down," says the learned author, as is indeed the fact, "was stated by Mr. Sutherland, both the Macnagh- tens and both the Stranges, and, as limited to the three regenerate classes, it has been affirmed by a singularly strong series of authorities in all parts of India as forbidding the adoption of the son of a daughter, or of a sister or of an aunt."

The case-law on the subject is thus supported by the unanimous opinion of celebrated European writers on Hindu law, who have hitherto been held to be high authorities on the subject. The only dissentient opinion is that of Dr. Jolly (Tagore Law Lectures for 1883), who for reasons similar to those expressed by Mr. Mandlik in his able notes to the translation of the Vyavahar Mayukha, thinks that "there is very little, if anything, in the Sanskrit treatises to warrant the formation of such a rule" (p. 163). The authority of European writers, it is contended, is founded on the following passage in Sutherland's Synopsis (Stokes' Hindu Law Books, p. 664):—"The first and fundamental principle is that the person proposed to be adopted be one who by a legal marriage with his mother might have been the legitimate son of the adopter. By the operation of this rule, a sister's son and offspring of other females, whom the adopter could not have espoused, and one of a different class, are

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excluded from adoption." And it is urged that the rule so laid down is different from that propounded in the Dattaka Mimansa (Sec. V, § 16 *et seq.* and Dattaka Chandrika, (Sec. II, § 8) on which it professes to be founded, that consequently the other European text-writers have been misled into adopting a rule for which there is no foundation in Hindu law, and that the Courts in accepting that rule have been misled by those text-writers. It must be borne in mind that Mr. Sutherland's Synopsis contains what must be regarded as the inferences drawn by him from the two works referred to above. Those two works were literally translated by him from the original Sankrit into the English language. It is not contended that the translations themselves are erroneous except in regard to minor verbal matters. On the contrary all the recent critics of the rule laid down by Mr. Sutherland have conceded that his translation of the original text bearing upon the present question is correct enough. There is therefore no valid reason for the contention that all other European writers and the learned Judges, both European and Indian, who have pronounced an opinion on the question have been guided simply by the inferences drawn in his Synopsis by Mr. Sutherland from the texts of the Dattaka Mimansa and the Dattaka Chandrika. According to the texts of the Dattaka Mimansa and the Dattaka Chandrika the test of eligibility for adoption is "the capability to have been begotten by the adopter, through appointment, and so forth." (Dattaka Chandrika, Sec. V, § 8, and Dattaka Mimansa, Sec. V, § 16.) The authors of the Dattaka Chandrika and the Dattaka Mimansa referred to the ancient practice of *Niyoga*, i. e., the practice of begetting a child by appointment, which has now become obsolete, and is prohibited in the *Kaliyug*; and Mr. Sutherland apparently confused it with marriage. But, as shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1), marriage was not possible where *Niyoga* was impossible, and therefore, in laying down the rule that it was illegal to adopt the offspring of a female whom the adopter could not have espoused, Mr. Sutherland did not propound a theory which could not be legitimately inferred from the Dattaka Chan-

(1) I. L. B., 11 Mad., 49.

drika and the Dattaka Mimansa. And so far as the question now before us is concerned, the European text-writers who have followed Mr. Sutherland have not fallen into gross error. I may add that besides the learned European scholars and Sanskritists who have accepted the rule forbidding the adoption of the son of a daughter or of a sister or of an aunt, enunciated by Mr. Mayne in § 123 of the Fifth Edition of his work, namely, Mr. Sutherland, both the Macnaghtens, and both the Stranges, and Messrs. West and Bühler, (see Hindu Law, p. 1028), two Hindu lawyers, namely, Babu Shyama Charan Sarkar, the author of the Vyavastha Darpan and the Vyavastha Chandrika, and Mr. Siromani, the author of Commentaries on Hindu Law, have adopted the same rule (see Vyavastha Chandrika, Vol. II, pp. 73 and 75, and Siromani's Commentaries, Second Edition, p. 165 *et seq*). The only writers who have expressed a contrary view are Mr. Mandlik, Mr. Golap Chandra Sarkar and Dr. Jolly. They do not deny that the Dattaka Chandrika, the Dattaka Mimansa, and the works of several other commentators are authorities in support of the view which is opposed to their own. They only question the value of those authorities. How far their objections to the value of those authorities ought to prevail I shall consider later on, but I may observe that notwithstanding the criticisms of Mr. Mandlik, a Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1) and a Full Bench of the Bombay High Court in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (2), have upheld the authority of the Dattaka Chandrika and the Dattaka Mimansa on questions of adoption. We have thus not only a uniform course of rulings of all the Courts in India since 1815 in support of the position that the adoption of the mother's sister's son is void, but we have also the almost unanimous opinion of modern writers on Hindu law, European and native, that such adoption is invalid.

Let us now consider whether the case-law and the authority of modern writers on the subject are wholly opposed to and inconsistent with what is regarded as the sacred laws of the Hindus.

(1) I. L. R., 11 Mad., 48.

(2) I. L. R., 14 Bom., 249.

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No doubt the "Hindu law must," as observed by the learned Chief Justice in *Beni Prasad v. Hardai Bibi* (1), "be ascertained from a consideration of the text of that law and of the authoritative commentaries, and not by attempting to construe the mistaken and misleading translations or unauthorized interpolations of English translators" (pages 79 and 80).

The sources of Hindu law, I need hardly point out, are the *Śrutis* or *Vedas*, the *Smritis* or the institutes of the sages, and the commentaries and digests. The commentaries and digests were written or compiled by later writers with the object of reconciling discrepancies in the sayings of the sages, and laying down complete and consistent codes of rules on different branches of law. The commentaries and digests, therefore, form an important part of the authorities on Hindu law, and have become, as the learned Judges of the Madras High Court have held, "new law sources." According to Mr. Morley (Introduction to the Digest, p. 201) "for final authority in deciding questions of law, recourse must be had to Commentaries and Digests," and it is these commentaries which, as pointed out by their Lordships of the Privy Council in the *Ramnad* case (2), have given rise to the different schools of Hindu law. The *Mitakshara*, which in these provinces regulates most questions of Hindu law, is itself only a commentary, and so are the *Dayabhaga* and the *Vyavahara Mayukha*, which are of supreme authority in the Provinces of Bengal and Bombay respectively.

Among the commentaries on the law of adoption are the *Dattaka Mimansa* and the *Dattaka Chandrika*, and both of them, and especially the former, have hitherto been regarded as the highest authorities in the Benares School on questions of adoption. According to Sir William Macnaghten, "in questions relative to the law of adoption, the *Dattaka Mimansa* and the *Dattaka Chandrika* are equally respected all over India," and "the former is held to be the infallible guide in the Provinces of Mithila and Benares." (Preliminary Remarks, p. xxiii.) This opinion was accepted by Morley in the Introduction to his Digest (p. 217), and the same appears to have

(1) I. L. R., 14 All., 67.

(2) 12 Moo. I. A., 397; at p. 435.

been the view of Mr. Colebrooke (see Strange's Hindu Law, Vol. II, p. 133, edition of 1830), and of Sir Thomas Strange himself. In the letter written by him to Lieutenant-Colonel Blackburne, dated 9th May 1812, Vol. II, p. 184, he said that the Dattaka Mimamsa by Nanda Pandita was "the highest authority upon the subject of adoption." The same was the opinion of the eminent Hindu lawyer Babu Shyama Charan Sarkar Preface to the Vyavastha Chandrika, p. 23, and Preface to the Vyavastha Darpan, p. 13). Mr. Sarbadhikari, in the Tagore Law Lectures for 1880, declared the Dattaka Chandrika and the Dattaka Mimamsa to be "the reigning authorities" on adoption in all schools (p. 519); and Mr. Siromani in his Commentaries on Hindu Law has recognised the high authority of those two commentaries on questions of adoption. The late Mr. Justice Dwarka Nath Mitter, one of the most eminent Hindu Judges who ever sat on the Bench, expressed the opinion that the Dattaka Chandrika and the Dattaka Mimamsa "are undoubtedly entitled to be considered, and have been always considered, as the highest authorities on the subject of adoption" [*Rajendra Narain Lakoree v. Sarodu Sonduree Dabee*, (1)] and Mr. Justice Romesh Chandra Mitter, in the judgment of the Full Bench in *Uma Sunker Moitra v. Kali Komul Mozumdar* (2) declared, with the concurrence of his learned colleagues, that the two treatises had been always accepted throughout India as conclusive on questions relating to adoption. Dr. Guru Das Banerji (at present a Judge of the Calcutta High Court), in his Tagore Law Lectures for 1878, considered the Dattaka Mimamsa to be the "highest authority in the Benares School in matters of adoption" (p. 364). Mr. Justice Nanabhai Haridas concurred with Sir Michael Westropp, C. J., in holding the two treatises to be of the highest authority in Bombay next to the Vyavahara Mayukha [*Lokshmiappi v. Ramova*, (3)]. Mr. Justice Muttusami Ayyar in the Full Bench case of *Minakshi v. Ramanada* (4) maintained the high authority of those treatises on questions of adoption. In *Tulshi Ram v. Behari Lal* (5) Mr.

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(1) 15, W. R., 548.

(3) 12, Bom., H. C. Rep., 364.

(2) I. L. R., 6 Cal., 256; at p. 265.

(4) I. L. R., 11 Mad., 49.

(5) I. L. R., 12 All., 328.

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Justice Mahmood expressed the opinion that the Dattaka Mimansa of Nanda Pandita was "a very high authority" in the Benares School upon questions of adoption, and that "the authoritativeness of the book, so far as the Benares School was concerned, had been fully recognised" (p. 341); and he did not resile from that opinion in *Beni Prasad v. Hardai Bibi* (1). The authority of the Dattaka Chandrika and the Dattaka Mimansa was recognised by the Lords of the Privy Council in *The Collector of Madura v. Moottoo Rama linga Sathupathy* (2). Their Lordships said at page 437:—"Of the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika of Devanda Bhatta, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India, but that when they differ the doctrine of the latter is adhered to in Bengal, and by the southern jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares." In *Waman Raghupati Bora v. Krishnaji Kashiraj Bora*, (3) a Full Bench of the Bombay High Court said that the Dattaka Mimansa and Dattaka Chandrika had been regarded in that Court as the leading authorities on the subject of adoption, and that in spite of the criticisms of Mr. Mandlik to the contrary, that Court "did not see reason to depart from the standard it had uniformly applied in appreciating the value of the different text-writers." A Full Bench of the Madras High Court also maintained similar views in the case of *Minakshi v. Ramanada* (4) to which I have referred above.

We have thus a singular consensus of opinion as to the high authority of the Dattaka Mimansa and the Dattaka Chandrika on questions of adoption. It is said that those two treatises have become widely known to the Judges and to European text-writers by reason of the fact that they were translated by Mr. Sutherland, and he set a high value on them, and that among Hindu lawyers and the Hindu public they are not known and their authority is not followed. Whatever the state of things may be in the Presidency of Bombay, there does not appear to me to be any warrant for the above

(1) I. L. R., 14 All., 67; at p. 108.
(2) 12 Moo., I. A. 397.

(3) I. L. R., 14 Bom., 249.
(4) I. L. R., 11 Mad., 49.

statement so far as these Provinces are concerned. Nanda Pandita, the author of the Dattaka Mimansa, was, according to the account furnished to Mr. Mandlik by the well-known Pandit Balshastri of Benares, a resident of that city. His ancestors removed from Bedar in Southern India to Benares. He wrote his commentary on Vishnu entitled Kesava Vaijayanti, in 1633 A. C. (Siromani's Hindu Law, p. 37). The Dattaka Mimansa is supposed to be a later work, but as reference is made to it in the Vaijayanti (see chap. 24) it seems to have been written before, or at least contemporaneously with, the Vaijayanti. It must, therefore, have been written in the early part of the seventeenth century, that is, between two hundred and fifty and three hundred years ago. The Dattaka Chandrika was written a few years earlier, and it is wholly immaterial whether the author of it was a person of the name of Kuvera, a native of Bengal, as Mr. Mandlik says, or Devanand Bhatta, as stated by Mr. Sutherland. There can be no doubt as to the authenticity of that work, and I am not prepared to place any value on the story which Mr. Golap Chandra Sarkar has stated to the contrary in his Tagore Law Lectures. A printed edition of both the Dattaka Chandrika and the Dattaka Mimansa appeared in Calcutta in 1817, and a translation of them into English by Mr. Sutherland was published in 1821 (Morley's Digest, Introduction, p. 216). From Mr. Sutherland's Preface the translation appears to have been commenced about 1814 and completed in 1819 (Stokes' Hindu Law Books, page 529), and the translation apparently did not become known to the public until some time in 1821. There is, however, clear and unmistakable evidence to show that the two works were well known to Hindu pandits and lawyers.

In the second volume of Macnaghten's Principles and Precedents of Hindu Law, where he has collected the opinions of Hindu law-officers upon questions propounded to them, I find that as authorities for the answers given to the questions put to the pandits in Case XVIII (pp. 197, 198, 199) they, on 20th April 1810, referred both to the Dattaka Mimansa and the Dattaka Chandrika. In the case of *Raja Sumsheer Mul v. Rani Dilraj Koonwur* (Case XIV, p.

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189), which was a case from the Gorakhpur district and was decided on the 3rd January 1815, the Dattaka Mimansa was relied upon, and it was distinctly stated in the opinion of the Hindu law officers that the adoption referred to in that case was "allowable according to the Dattaka Mimansa, which is current in Gorakhpur." Similarly the opinion expressed in Case V (p. 180) on 19th March 1815, was stated to be "conformable to the doctrines of Manu, the Vyavaharatatwa, the *Dattaka Mimansa* and other law books." In 1823, 1824, and 1826 both the Dattaka Mimansa and the Dattaka Chandrika were referred to by the pandits in the cases mentioned in pages 175, 179 and 183. Turning, again, to Stranges' Hindu Law, I find under "*Responsa Prudentum*," a case decided by the Provincial Court of Masulipatam on 27th July 1809 (Vol. II, p. 103) in which the pandit in his answer referred to the Dattaka Mimansa and the authority of Sákala quoted in it. Mr. Ellis, in a paper communicated on 16th August 1812, referred "to a correct copy of Nanda Pandita's *Dattaka Mimansa* procured at Madras." (Strange's Hindu Law, Vol. II, p. 169). In the case of *Raja Haimunchull Singh v. Kosmer Gunseeam Singh* (1) which was a case from the Etáwah district, instituted in 1810 and decided in 1813 by the Provincial Court, and in 1817 by the Sadar Dewani Adalat of Bengal, within whose jurisdiction the district of Etáwah then was, the pandits referred to the Dattaka Mimansa "as in force in the zila Etáwah." The pandits of the Provincial Court of Bareilly no doubt referred to the Mitakshara and the Vyavahar Mayukha, a work of authority in Bombay; but it must be borne in mind that the Mayukha also deals with the question of adoption, and being, like the Mitakshara, a commentary on Jajnavalkya, it could with propriety be referred to at the same time with the Mitakshara. It is thus clear that even before Sutherland had commenced to translate the Dattaka Chandrika and the Dattaka Mimansa, those works were well-known among Hindu pandits as authorities on questions of adoption not only in Northern India, but also in the Presidency of Madras. It is true that no reference is made to them in Colebrooke's Digest of Hindu Law compiled in 1796, but it must be remembered

(1) 2 Knapp, 203.

that in the Digest very little prominence was given to the question of adoption. It may be that Jagannath Tarkapanchanan, the author of the Vivadabhangarnava, which is the original of Colebrooke's Digest, was not aware of the Dattaka Chandrika and the Dattaka Mimansa or did not consider them to be works of authority, but the Privy Council in *Rungam v. Atchana* (1) followed those treatises in preference to Jagannath's work. Besides, whatever may be the authority of Jagannath Tarkapanchanan in the Bengal school he is not regarded as an authority in the Benares school, and his own translator, Mr. Colebrooke, said of him that "we have not here the same veneration for him, when he speaks in his own name" (Strange's Hindu Law, Vol. II., p. 176). Mr. Colebrooke, himself, as I have said above, considered the Dattaka Mimansa to be a work of authority. In a letter which he wrote to Sir John Roysds on 14th March 1812, he said with reference to that treatise, that it was "no doubt the best treatise on Hindu adoption" (Strange's Hindu Law, Vol. II, p. 133). I need hardly add that Mr. Sutherland considered the Dattaka Mimansa and the Dattaka Chandrika to be works of great authority. In the Preface to his translation he said "the Dattaka Mimansa is the most celebrated work extant on the Hindu law of adoption. Its author, Nanda Pandita, has attained considerable literary pre-eminence." "The Dattaka Chandrika . . . is a work of authority, and supposed to have been the groundwork of Nanda Pandita's disquisition" (Stokes' Hindu Law Books, p. 527). The reason why, among all others, he selected the two works for translation was that, "justly or unjustly," they were held in estimation, and that such was the fact I have shown from the references made to them by pandits so far back as 1809 and 1810.

It is true that the Dattaka Chandrika and the Dattaka Mimansa are works of a comparatively recent date, though they are now more than two hundred and fifty years old. But the law of adoption is itself of recent development. In early times when there were twelve modes of affiliating sons, the adopted son held a very unimportant and inferior position. But as with the growth of time the Hindu mind

(1) 4 Moo. I. A., 1.

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formed different conceptions in regard to the relations of the sexes, and all other forms of affiliation fell into desuetude, adoption came into great prominence, and in modern times the only sons who received recognition were the son born and the adopted son. It is, therefore, natural to expect that it is modern writers only who would deal elaborately and comprehensively with the law of adoption. Two of the earliest treatises which treated solely of adoption appear to have been the Dattaka Chandrika and the Dattaka Mimansa, and as they have been in existence for nearly three centuries, and have, as I have shown above, been recognised as the highest authorities on questions of adoption, not only by European text-writers, but by almost all the Hindu Judges who have sat on the benches of the different High Courts; by other eminent judges, European and Indian; by two Full Benches of the Madras and the Bombay High Courts; by their Lordships of the Privy Council; by almost all Hindu text-writers; by Hindu pandits who have since the commencement of the present century expressed opinions on questions of Hindu law, it seems to me to be too late now to ignore the authority of those treatises and in the face of such a strong array of authority one should hesitate to accept the contention of the learned vakil for the appellant that no value should be placed on them. It is noteworthy that so far as the present question is concerned (1) the Sanskara Kaustubha; (2) the Dharma Sindhu; (3) the Dattaka Nirṇaya (which are authorities in the Western Presidency, see Mandlik, p. 489); (4) the Dattaka Kaumudi (see Jolly, p. 308, and Golap Chandra Sarkar, p. 327); (5) the Dattaka Darpana; (6) the Dattaka Didhiti; (7) the Dattaka Manjari (see Sarkar, p. 327); and (8) the Dattaka Siromani (see Appendix to Dr. Jolly's Tagore Law Lectures), are of the same opinion as the Dattaka Mimansa and the Dattaka Chandrika.

It has been observed with great truth by Messrs. West and Bühler (p. 865) that "in the present day it does not seem likely that the fountain heads of the law will be much drawn on for new principles in the Law of Adoption. They are indeed too meagre to afford such principles save through an elaborate process of construc-

tive inference. To this they have been subjected by the Hindu writers for many centuries, and the rules deduced by these writers have in their turn been tried and sifted by express or tacit reference to the usages and the peculiarities of Hindu society, until those best suited to its needs have been ascertained and appropriated. The Smritis come nearer than the Veda to modern practice, but the most important authorities are the writers such as have been referred to, whose expositions have partly embodied and partly fashioned the customary law." A similar view was held by a Full Bench of the High Court of Madras in *Minakshi v. Ramanada* (1) to which I have often referred. The learned Judges said:—"The suggestion made by the appellant's pleader that we should now see whether the commentator's interpretation by analogy was justifiable cannot be adopted. It should be remembered that in several instances the commentaries themselves have become new law-sources, owing to the adoption of the opinion expressed therein by the people as part of the customary law. It is not possible to say beforehand, except by reference to actual usage, whether the opinion of the commentator on any particular point is part of the Hindu law as received by the people; and the only course open to Courts of Justice is, as pointed out by Muttusami Ayyar, J., in the *Sivaganga* case,—*Muttu Vaduganadha Tettar v. Dora Singha Tettar* (2)—to take the commentaries which are accepted generally as authoritative as containing the law applicable to the parties, unless they show by clear evidence that in some special matter the usage of the people is not in accord with them."

These observations, in my opinion, carry great weight and they have my full concurrence. The commentaries, in the present days, are an important factor in determining what in respect of each particular question are the sources of Hindu law, and unless it can be shown that they are in direct violation of established rules of law as propounded by the Sastras, or of ancient usages clearly proved to exist in a particular locality or among a particular class, their authority should not be ignored simply on the ground that some of the

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(1) I. L. R., 11 Mad., 49.

(2) I. L. R., 3 Mad., 290.

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arguments advanced by them may be open to criticism. In this view, having regard to the fact that the Dattaka Mimansa and the Dattaka Chandrika have for three quarters of a century received judicial recognition in all parts of India as works of paramount authority on questions of adoption, any one now attempting to detract from their value must do so on very cogent grounds. Such grounds have not, in my opinion, been established in this case.

It is not disputed that according to Nanda Pandita, the author of the Dattaka Mimansa, and to the author of the Dattaka Chandrika, the adoption of a daughter's son, a sister's son or a mother's sister's son is absolutely interdicted. Let us see whether this interdiction is supported by the texts of any of the sages, or it is opposed to any such texts.

Both the works rely upon the following text of Sákala, also called Sákalya :—

“ Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son the offspring of a sapinda relation particularly : or also, next to him, one born in the same general family : if such exist not, let him adopt one born in another family : except a daughter's son, a sister's son, and the son of the mother's sister.” (Datt. Mim., sec. II, § 107) ; and (Datt. Chand., sec. I, § 11.)

The above is Mr. Sutherland's translation and Mr. Golap Chandra Sarkar's translation is also to the same effect. There can be no doubt that the above text of Sákala contains a positive interdiction against the adoption of the son of a daughter, a sister or a mother's sister. It confers a right with a limitation, the limitation being the exclusion of the daughter's son, the sister's son, and the mother's sister's son. As the right exists with the prohibition, whoever exercises the right must abide by the prohibition. On this ground Mr. Golap Chandra Sarkar's argument that the rule being enabling and optional the prohibition is optional also, is, in my judgment, fallacious. No reason having been given for the prohibition, it must, according to Jaimini's rule of construction, be held to be a positive and absolute prohibition, and not a mere direction.

Sākala's authority as a Sutra writer is undoubted. The principal *Sākha* of the Rig-Veda is called after his name (see Mandlik's Introduction to the Mayukha, p. 8, and Siromani's Hindu Law, p. 20). He is mentioned in the Smṛiti Ratnakara as one of the writers of the nine *purva* (prior) Sūtras. (Mandlik's Introduction, p. 13 and Siromani, p. 24.) In the Mahabharat he is named as a lawgiver (Mandlik's Introduction, p. 15). In the Preface to the Vyavastha Chandrika (p. 4) he is enumerated among "the sages who wrote on the Dharma Shāstra;" and in West and Bühler (p. 28), he is mentioned as a Smṛiti writer, part of whose writings was in existence. He is also mentioned as a *rishi* in Colebrooke's Essays on the Religion and Philosophy of the Hindus, contributed to the Asiatic Researches in 1798 and 1805. No reason has been shown to us to justify our assuming that the text cited in the Dattaka Chandrika and the Dattaka Mīmāṃsā as that of Sākala is not genuine, or that it is incomplete. It is too much to assume that the text was fabricated by the authors of those two treatises. Portions of Sākala's writings are, according to West and Bühler, now extant, and had the text attributed to him not been genuine, there would have been no difficulty in establishing its falsity. It would not certainly have been allowed to go unchallenged for upwards of 250 years, and the several native Hindu lawyers who have written on adoption would not have accepted the rule propounded by him. There is thus the undoubted authority of Sākala in support of the rule of exclusion laid down in the Dattaka Chandrika and the Dattaka Mīmāṃsā.

The next authority for Nanda Pandita's conclusion is a text of Saunaka. He, too, was a *rishi* of unquestioned authority. He was referred to as an authority even by Manu. In Chapter III, p. 16, Manu said:—"According to Atri and to (Gotama) the son of Utathya, he who thus marries a woman of the servile class, *if he be a priest*, is degraded instantly; *according to Saunaka on the birth of a son, if he be a warrior*." (See Sir William Jones's translation of the Manava Dharma Shāstra, edition of 1863, p. 49; also Sacred Books of the East, Vol. XXV, p. 78). The Saunaka Smṛiti

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is in existence, and has been partially translated by Dr. Bühler in the Journal of the Asiatic Society, Vol. 35, Part I., p. 149 *et seq.* Portions of his text bearing on the present question are cited in the Dattaka Mimansa (Sec. II, § 74, and sec. V, §§ 16 and 18). A translation of the whole text is given in Mr. Golap Chandra Sarkar's Hindu Law of Adoption, p. 308. That portion of it which has been reproduced in the Vyavahara Mayukha has been translated at pp. 52 and 53 of Mr. Mandlik's book, and Mr. Mandlik has in a subsequent part of his work given a translation of his reading of a portion of the text.

The rule which Nanda Pandita has deduced from the text of Saunaka is that no one is eligible for adoption between whom and the adopter there is incongruity of relationship (*virudha sambandha*), and as the incongruity which exists between a person and his daughter's son or sister's son or his mother's sister's son is such as would prevent the latter being the son of the former, the latter cannot be adopted by the former. "The test for determining whether an affiliation involves incongruous relationship is," according to Nanda Pandita, "the capability to have sprung from (the adopter) himself through an appointment (to raise issue on another's wife) and so forth" (sec. V, § 16).

It must be borne in mind that the object of adoption being the affiliation of a son for spiritual benefit and the perpetuation of lineage, the ancient writers on Hindu law were anxious that the adopted son should, as far as may be, resemble a son born, and be able to confer spiritual benefit with efficacy. "He is to be," as Sir Thomas Strange says (Vol. I, p. 83), "at the least such as that he might have been his son." And as Mr. Mayne says (§ 94) "he was to look as much like a real son as possible, and certainly not to be one who could never have been a son." It was for this reason, it seems, that Manu ordained in Chapter IX, v. 168, that the boy to be adopted was to be *putra sádrisa*, that is, was to resemble or be like a son. For the same reason Saunaka declared that he should be *putra chckhaya baham*, i.e. should "bear the reflection of a son." Neither of them said in what respect the resemblance was to be.

With regard to the dictum of Manu, some of his commentators were of opinion that the resemblance was to consist in the adopted son being of the same class as the adopter. With reference to Saunaka's text, Nanda Pandita declared that the resemblance was to consist in "the capability to have sprung from (the adopter) himself, through an appointment (to raise issue on another's wife), and so forth; as (in the case) of the son, of a brother, a near or distant kinsman, and so forth" (Sec. V, § 16; and he deduced the conclusion that "the brother, paternal and maternal uncles, the daughter's son, and that of the sister are excluded: for they bear not resemblance to a son" (§17).

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It was contended that Saunaka did not intend the words "bearing the reflection of a son" to be a limitation to the adoptee's capacity to be adopted, and that the resemblance was not intended to be antecedent to the ceremony of adoption. In support of this last contention, reference has been made to the translation of the text in question by Dr. Bühler in the Asiatic Researches, p. 160, which is as follows:—"He then should adorn the child which (now) resembles a son of the receiver's body, with the dresses and other (ornaments mentioned before)." And it is said that what is meant is that the boy has by reason of the ceremonies of giving and taking become a resemblance of the son. This contention is not, in my opinion, valid. The passage is thus translated by Mr. Golap Chandra Sarkar (p. 308), and Mr. Mandlik's translation is nearly in the same terms:—

"The giver *being capable of the gift* should give to him with the recitation of the five *riks* commencing with '*ge gajnena*.' (The adopter) having taken (the boy) by both hands . . . having adorned the boy *bearing the reflection of a son* with clothes and the like; having brought him accompanied with dancing . . . should complete the remaining part of the ceremony." The whole context of this passage shows that prior to the performance of all the ceremonies which would complete the adoption, the giver should be a person "capable of the gift," and the boy should be one "*bearing the reflection of a son*." It cannot, in my opinion, be reasonably

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contended that the boy "*now* bears the reflection of a son," because by reason of the adoption he does not become the reflection of a son but for all practical purposes he becomes the actual son of the adopter with all the rights and obligations of a real son, and I am of opinion that the meaning put on the text by Nanda Pandita is its true meaning. It has been fully shown in the judgment of the Full Bench of the Madras High Court in *Minakshi v. Ramanada* (1) that the rule of exclusion deduced by Nanda Pandita founded on propinquity and incongruous relationship is not an inconsistent rule, and all I need say is that I concur in that judgment and in the reasons given in it for the conclusion at which the learned Judges arrived. The object of marriage among Hindus is to procreate a son able to confer spiritual benefit, and this cannot be done by the issue of an incestuous marriage. Hence the rules for marriage within prohibited degrees. The same being the object of the procreation of a son through the now obsolete practice of *Niyoga* rules of prohibited relationship in *Niyoga* were also provided. As adoption is resorted to for a similar object, similar rules of exclusion founded on the analogy of *Niyoga* are the necessary consequence of the requirement of Saunaka that the son to be adopted should "bear the reflection of a son" that is of a son born in wedlock: otherwise the efficacy of adoption would fail, as in that case the son to be adopted would bear the resemblance of the issue of an incestuous connection. Hence the rule propounded by Nanda Pandit in section V, § 20, that "such person is to be adopted as with the mother of whom the adopter might have carnal knowledge," as translated by Sutherland, or "for the mother of whom the adopter may feel sexual love," as translated by Golap Chandra Sarkar, is a legitimate inference from and is warranted by the text of Saunaka that the adopted son should bear the reflection of a son—a text which thus imposes a prohibition on the adoption of persons of the description mentioned in § 20 of section V of the Dattaka Mimamsa. As the son of the mother's sister comes within that description of persons the adoption of such a son is interdicted by Saunaka.

(1) I.L.R., 11 Mad., 49.

Another text of Saunaka on which Nanda Pandita relies is thus stated in §74, section II of Sutherland's translation :—" Of Kshatriyas, in their own class positively : and [on default of a sapinda kinsman] even in the general family, following the same primitive spritual guide (Guru) : of Vaisyas, from amongst those of the Vaisya class (*Vaisya jatesku*) : of Sudras from amongst those of the Sudra class. Of all, and the tribes likewise, [in their own] classes only ; and not otherwise. But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes, a sister's son is nowhere [mentioned as] a son." The last two sentences are thus rendered by Mr. Mandlik (p. 491) :—" A daughter's son or a sister's son is adopted as a son by Sudras alone. In the case of the three classes beginning with the Brahmana, a sister's son [and a daughter's son] are nowhere mentioned as sons."

The last sentence is not quoted in the extract from Saunaka given in the Vyavahara Mayukha (see Mandlik, pp. 52 and 53), and it apparently did not exist in the copy of the Saunaka Smriti which was translated by Dr. Bühler. If that sentence does not appear in the text, the argument that it was a reason for the rule propounded in the text, *viz.* that a daughter's son and a sister's son can be affiliated by Sudras only, and that by applying Jaimini's rule of interpretation the said rule could be regarded only as directory, and not as mandatory, falls to the ground. If the sentence "for the three superior tribes, a sister's son is nowhere (mentioned as) a son," does as a matter of fact, appear in the text, and the weight of authority is that it does, Saunaka does not use it as a reason for what precedes (although Nanda Pandita thinks that he does), and therefore the text of Saunaka, as a whole, cannot be regarded as a direction merely. The text appears in several manuscript copies of the Saunaka Smriti now in existence. As I read the text, it lays down the rule as to the classes of persons from among whom the boy to be adopted should be selected ; and it provides an exception to that rule in the case of a daughter's son or a sister's son who, it says, is not eligible for adoption except among Sudras, and is forbidden to the three superior classes. This text is, in my opinion, a positive

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interdiction against the adoption of a daughter's son or a sister's son among the three higher classes and cannot be treated as directory merely.

Referring to this text, Nanda Pandita says in section II, §91 :—
“The part of the text, (but a daughter's son, &c.,) propounds an exception, as to those of the three first tribes, with respect to the daughter's son and sister's son, inferred from the mention of propinquity in the general.” In §92 he says “since (the particle ‘but’ having an exclusive import) a restriction, by Sudras only, is conveyed; those of the three first tribes are excluded.” And the conclusion at which he arrives is, “that the expression ‘sister's son’ (in the last sentence of Saunaka's text, §74), is illustrative of the daughter's son, and mother's sister's son, and this is proper: for, prohibited connection is common to all three” (§108).

The result of Nanda Pandit's argument is that he deduces the rule of exclusion based on propinquity. For that rule he has, as I have said above, the authority of Sākala, who imposes a positive interdiction. He has also the authority of Saunaka, who, in requiring that the boy to be adopted should bear the reflection of a son, also lays down a prohibition. The remainder of his text, quoted above, also imposes a prohibition, as I have said above. But whether that portion of his text only propounds an existing rule or lays down a rule which is only directory or imposes an absolute interdiction, Nanda Pandita has relied upon it as only illustrative of the rule which he has deduced—an exception to that rule existing in the case of *Sudras* only. For this conclusion he had sufficient authority in the texts of Saunaka. The exception in the case of *Sudras* does not make his rule inconsistent, for, as was observed by Westropp, C.J., in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (1), on the strength of a note supplied to him by that eminent Judge and Sanskritist, Sir Raymond West, “the Hindu law regarded the *Sudras* as slaves, and their marriages as little better than concubinage.”

(1) I. L. R., 3 Bom., 273.

It has been contended that Nanda Pandita's conclusion, and the rules propounded by him, are not supported by any text of Manu or Vasishtha or Jajnavalkya. This is true : but it must also be remembered that those sages did not deal completely and exhaustively with the law of adoption as existing among Hindus, and did not lay down full and clear rules as to the qualifications of the persons to be adopted. The absence of any texts in their writings is not therefore surprising, and cannot affect the present question one way or the other.

It is next urged that there is a text of Yama which is inconsistent with the rule laid down in the Dattaka Mimansa and the Dattaka Chandrika, and which sanctions the adoption of a daughter's son. This text has been quoted by Mr. Mandlik at page 483, and is as follows :—"In the case of a daughter's son and a brother's son, the rule in regard to a sacrifice and the like does not prevail. (The act of adoption) is complete by a verbal gift alone, so says the holy Yama." The text evidently refers to ceremonies connected with adoption and is alleged to have been quoted in the Sarasvativilasa, which is a work accepted in the Bombay Presidency, but is of no authority in the Benares School. Mr. Mandlik does not vouch that the text appears in the Sarasvativilasa, but he says that the verse is quoted in the Dattaka Darpana with the preamble that "it is said in the Sarasvativilasa" that the text referred to was a text of Yama. We have thus for the authenticity of the text the fact that the Dattaka Darpana says that it is said in the Sarasvativilasa that Yama says that in the case of the adoption of a daughter's son the rule with regard to a sacrifice does not prevail, and thus sanctions by implication the adoption of a daughter's son. This certainly is very meagre evidence of the authenticity of the text attributed to Yama. It is not alleged that the text appears in the Yama Smriti and Yamadharma sastra, which are now extant and to which reference is made by Mr. Mandlik at pages 295, 296 and 297. Mr. Golap Chandra Sarkar admits at page 334 that he has not seen the text cited in any commentary of note, and that he only heard Pandit Bharat Chandra Siromani repeat it to his pupils.

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It is noteworthy that Pandit Bharat Chandra Siromani does not refer to the text in his own work on adoption called the Dattaka Siromani. This circumstance raises the inference that Pandit Bharat Chandra Siromani himself did not consider the text to be authentic. It is not in the Yama Sanhita recently published in Calcutta. Even if the authenticity of the text of Yama be conceded we have a text which is in conflict with the text of Sākala and Saunaka. Now, where there is a conflict of texts "there are," according to Mr. Mandlik (p. 492), "two ways in which our jurists get out of such a difficulty, one is to follow either text; the other is to hold that the two texts refer to different parts of the country. The Dattaka Nirṇaya quotes an authority for the latter mode of interpretation:—'When Srutis or Smritis disagree (on any point), a difference of place (where they are adopted) is assumed (for the purpose of reconciling them).'" And Mr. Mandlik thinks "that the existence of the prohibition in reference to some parts of India, and the non-existence of it in reference to others is . . . the real solution of the whole question." The text attributed to Yama may, according to Mr. Mandlik's reasoning, be an authority for the adoption of a daughter's son in the Presidency of Bombay, where the Sarasvativilasa is accepted as an authority, but cannot be regarded as of any value in these provinces, and cannot override the texts of Sākala and Saunaka on which commentaries, recognised as high authorities on this side of India for nearly three centuries, are founded.

In the face of the consensus of authority to which I have referred above, all leading to only one conclusion, I am not prepared to accept the contentions of the learned vakīl for the appellant which are founded on the criticisms of Messrs. Mandlik and Sarkar and of Dr. Jolly, most of which are attempts to prove that Nanda Pandita's conclusions are erroneous.

As for Mr. Mandlik's objections they are based mainly on the text of Yama referred to above, and on the existence of a usage in the Bombay Presidency in conflict with the rule laid down in the Dattaka Mimāṃsa. I may repeat what I have already said that,

notwithstanding Mr. Mandlik's criticisms, the High Courts of Bombay and Madras have in Full Bench refused to accept his views and to ignore the authority of the Dattaka Mimansa. Besides, as his arguments have chiefly for their basis the custom of adoption prevailing in the Western Presidency, they have no weight in these provinces. Mr. Golap Chandra Sarkar's principal argument is that as the affirmatory rule as to the choice of the persons to be adopted is directory, the exception to that rule cannot be imperative. This, as I have said above, is a fallacy, and the learned vakil for the appellant has frankly admitted it to be so. Dr. Jolly's objections have reference to the conclusions of Nanda Pandita, the obsolescence of the doctrine of *Niyoga*, and the incorrectness of Sutherland's marriage theory. These I have already disposed of.

The only other question which has been pressed on our consideration is whether the prohibition against the adoption of a mother's sister's son is directory only or absolute. This point I have already dealt with. In my opinion according to the texts of both Sākala and Saunaka, such adoption is absolutely interdicted and void and cannot be validated by the rule of *factum valet*. The transaction being a nullity, there could be "in such case no *factum*" (per Westropp, C.J., in *Lakshmappa v. Ramana* (1)).

We have thus on the question of the validity of an adoption like that alleged by the appellant the texts of two Smriti writers interdicting such an adoption and no positive text authorizing it. We have against the validity of such an adoption the authority of the Dattaka Mimansa and the Dattaka Chandrika, which have been held to be paramount by almost all modern text writers, European and native; by almost all the Hindu Judges of the different High Courts; by most European and other Judges, some of whom were eminent Sanskrit scholars; by the Full Bench Rulings of two High Courts; by Hindu Pandits and Sastris ever since 1809; and by their Lordships

(1) 12 Bom., H. C. Rep., 354; at p. 397.

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of the Privy Council. We have the further fact that such adoption has been condemned by no less than eight other modern Hindu writers on the law of adoption, to whom I have referred above, who have formed independent opinions of their own and have not blindly followed the Dattaka Mimansa and the Dattaka Chandrika. We have also the fact that since 1815 all the Courts in India have held such adoption to be void, and except a single case in 1810, which Sir Francis Macnaghten says was subsequently overruled, there is not a single reported case in any part of India in which a contrary view was held. We have then against the validity of the appellant's adoption, not only a uniform course of judicial decisions, extending over more than three quarters of a century, but also the inference of the existence of a usage in conformity with what has for such a long period been understood to be, and accepted as the law of the Benares School on the subject, and not the faintest suggestion of the existence of a contrary usage. We have thus against the appellant's contention everything which in these days must be regarded as the sources of Hindu Law, *viz.* (1) Authorities of Sages and Commentators; (2) Judicial Decisions, and (3) Usage. So that, in the words of that eminent Judge, Mr. Justice Mahmood, "we should be doing nothing more nor less than introducing not only a social, but a religious innovation, and disturbing the accepted rules of succession to property by adopted sons if we were to abrogate the uniform course of decisions in this part of the country dating so far back as 1815." "We should," to quote the same learned Judge, "be shaking settled titles and undoing the uniform judicial exposition of more than half a century of British rule in India, if we were . . . to adopt the argument of the learned vakil for the appellant that ever since 1816 (1815 in this case) the Courts of British India have misunderstood the doctrines of the Benares School of Hindu law as to adoption." *Tulshi Ram v. Behari Lal* (1).

For the above reasons I hold that the alleged adoption of the appellant was void, and I would dismiss this appeal with costs.

(1) I. L. R., 12 All., at p. 385.

AIKMAN, J.—I have had the privilege of reading the judgments of the learned Chief Justice and my brother Banerji. It must, I think, be admitted that in his able and exhaustive judgment the Chief Justice has succeeded in demonstrating that the weight of authority against the legality of the adoption which the appellant seeks to set up is not by any means so overwhelming as Mayne and other writers on Hindu law have believed it to be. But when all has been said, I think there is still, as is shown by my brother Banerji in his judgment, strong authority for holding that the adoption is illegal according to Hindu law, and that it is therefore incumbent on the appellant to adduce clear proof of usage if he wishes the adoption to be maintained. This he has not done. It would be difficult for the other side to prove that there is no such usage; but in my humble opinion there is some force in the argument which the learned vakil for the respondents based on the very small number of reported cases in which the legality of such an adoption has been challenged. As Mayne remarks, "the effect that every adoption must have upon the devolution of property causes every case that can be disputed to be brought into Court." It seems to me that, if there were no bar against it, a sonless Hindu would from natural affection prefer to adopt the son of a daughter, a sister, or a mother's sister rather than the son of a more distant kinsman; such an adoption if made would undoubtedly, on the authorities as they at present stand, be eminently capable of being disputed, and I therefore think that it is not unreasonable to draw an inference from the paucity of reported cases against the existence of any such usage. This may not be a very strong argument, but such as it is, it to my mind tells in favour of the respondent. It is true that the authors of the Dattaka Mimansa and Dattaka Chandrika, the special treatises on the subject of adoption, are only commentators. But the works of commentators occupy a peculiar position in Hindu jurisprudence. Wilson, in his introduction to Sir W. Macnaghten's Principles of Hindu and Muhammadan Law, remarks:—"The law books of the Rishis, even of Manu and Yajñawalkya, although they furnish the groundwork of Hindu jurisprudence, are not regarded as prac-

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tical guides, except when elaborated by their commentators, as in the case of the Mitakshara, works of preferable weight on the systems of late jurists, or separate treatises on special topics, as inheritance, adoption and the like (p. XV, Introduction)."

The authors of these two treatises pronounce against the legality of an adoption such as that set up by the appellant. The text of Çakalya, which they each cite, clearly bears out their view, and I do not think we have sufficient ground for supposing that they have either invented or garbled this text.

The authors of these treatises also rely on a text of Çaunaka, which contains this passage: "For the three superior tribes, a sister's son is nowhere (mentioned as) a son." In s. II § 108 of the Dattaka Mimansa, the author, Nanda Pandita, referring to the above passage of Çaunaka, holds that the expression "sister's son" is illustrative of the daughter's son and mother's sister's son, and he goes on to say,—“This is proper, for prohibited connexion is common to all three.” From this and other passages (see in particular Dattaka Mimansa, v. 20) Sutherland has formulated the rule that no one can be adopted whose mother the adopter could not legally have married. If the assertion of Çaunaka that “a sister's son is nowhere mentioned as a son for the three superior tribes” can be, as Nanda Pandita supposes, looked on as a “reason” for what immediately precedes, this might, applying the rule of construction set forth in the Mimansa of Jaimini, render the preceding passage an admonition and not a positive prohibition. But this course of construction will not affect the broad statement in the passage quoted, as it itself is not followed by any reason. The passage quoted seems to me to be neither a prohibition nor an admonition, but simply the assertion of a fact. The case law on the question has been gone into exhaustively in the judgments of the learned Chief Justice and my brother Banerji.

I regret much that I find myself on the question referred to us unable to agree with the learned Chief Justice and the majority of my colleagues. I concur with my brother Banerji, and hold that

the adoption propounded by the appellant is contrary to Hindu law, and is not shown to be sanctioned by any special usage of the caste to which he belongs. I would therefore dismiss this appeal.

EDGE, C. J.—The suit in which this appeal has arisen was brought by the paternal uncles of Madho Singh, deceased, against Bhagwan Singh, a minor, Musummat Matan Kuar, the widow of Madho Singh, and Musummat Sughi Kuar, the mother of Madho Singh, for declarations that the plaintiffs were as reversioners entitled upon the death of Matan Kuar and Sughi Kuar to certain immovable property which had belonged to Madho Singh in his lifetime, and that an alleged adoption of the defendant Bhagwan was null and ineffectual.

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Madho Singh was a sonless and a separated Hindu. The defendant Bhagwan Singh is the natural son of a sister of Madho Singh's mother; and it is alleged by the defendant Bhagwan Singh and denied by the plaintiffs that he was in fact adopted by Madho Singh. That issue as to whether in fact the adoption took place has not yet been tried. The plaintiffs dispute that alleged adoption on several grounds, only one of which need be considered by us at present.

It was in the Court below successfully contended on behalf of the plaintiffs that the defendant, being a son of a sister of the mother of Madho Singh, an adoption of him by Madho Singh was prohibited by, and was illegal under, the Hindu law; and consequently that the adoption alleged by the defendant Bhagwan Singh, if it in fact took place, was void and ineffectual. Syed Akbar Husain, then the Subordinate Judge of Cawnpore (accepting the view of the law expressed in paragraph 115 of Mr. Mayne's Hindu Law and Usage), held that as the parties belonged to one of the three regenerate classes of Hindus, the alleged adoption was prohibited and void, and, without trying any of the other issues in the suit, gave the plaintiffs a decree, declaring the plaintiffs to be entitled as reversioners and the alleged adoption to be void. From that decree the defendant Bhagwan Singh has appealed to this Court. His appeal has been referred to the Full Bench.

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It is conceded by both sides and could not be disputed, that amongst Sudras the adoption of the son of a daughter, of the son of a sister, or of the son of a sister of the mother of the adopter is permissible under the Hindu law, but it is contended on behalf of the plaintiffs that the Hindu law prohibits, and makes illegal, an adoption by any one of the three regenerate classes of a sister's son, of a daughter's son, and of a son of a sister of the mother of the adopter. In support of that contention the Dattaka Mimansa of Nanda Pandita, a text cited in that Mimansa as a text of Sákalya, a text cited in the same Mimansa as a text of Saunaka, opinions expressed by Sir Francis Macnaghten in his *Considerations on the Hindu Law as it is Current in Bengal*, by Sir William Macnaghten in his *Principles and Precedents of Hindu Law*, by Sir Thomas Strange in his *Hindu Law*, by Mr. Mayne in his *Hindu Law and Usage* and in Messrs. West and Bühler's *Digest of the Hindu Law* and certain decisions of the Courts in India have been relied upon.

It will, I think, be found, on consideration that the case for the plaintiffs depends on the question as to how far the views of Nanda Pandita as expressed in his Dattaka Mimansa were justified and can be relied upon; and if those views were justified, then, upon the equally important question as to how far, if at all, the Dattaka Mimansa of Nanda Pandita has been accepted as a commentary of authority by the School of Benares, and as binding upon Hindus of that school.

On the other hand, it has been contended before us on behalf of the defendant that there is no authoritative prohibition in the sacred law of the Hindus against the adoption by one of the three regenerate classes of a daughter's son, of a sister's son, or of a son of a sister of the mother of the adopter; that no such prohibition and no text containing such a prohibition have been accepted or acted upon by the Hindus subject to the Benares School of Hindu law; that the view that such a prohibition existed originated in the Dattaka Mimansa of Nanda Pandita, or in the Dattaka Chandrika; that the alleged text of Sákalya appeared, so far as can be now

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ascertained, in the Dattaka Chandrika for the first time; that, even if the text in question was in fact a text of Sākalya, Sākalya was not accepted as an authority of importance by the Benares School of Hindu law; that Sākalya was not referred to in the Mitakshara or in any book of the Hindus received as an authority by the School of Benares; that no such limitation is to be found in the laws of Manu, in any text of Vasishtha, in any of the Vedas, Srutis or Smritis, or in the Mitakshara, or in any other Commentary on the Hindu Law prior in date to the Dattaka Mimamsa of Nanda Pandita or the Dattaka Chandrika. It was also argued on behalf of the defendant that the early English text writers on the subject were influenced by Mr. Sutherland's Synopsis and by the translation into English of the Dattaka Mimamsa, at a time when most of the Sanskrit texts were as yet untranslated into English, and that they attributed an undue importance to the Dattaka Mimamsa, which was merely a Commentary on the Hindu Law of Adoption, written by Nanda Pandita within the last 300 years. Reliance was also placed on behalf of the defendant on certain decisions of Courts in India, and upon the opinions expressed by that eminent Sanskrit scholar and writer on Hindu Law, Professor Jolly (Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption as Contained in the Original Sanskrit Treatises) and upon the criticisms of the late Vishvanāth Narayan Mandlik in his Vyavahārī Mayūkha, and upon certain texts cited in the Hindu Law of Adoption of Golap Chandra Sarkar. It was also contended and with much force on behalf of the defendant that, before deciding that in these provinces such a restriction of the right of adoption existed, we should be reasonably satisfied that the adoption by one of the three regenerate classes of a daughter's son, of a sister's son and of a son of a sister of the mother of the adopter was in fact prohibited in authorised texts of the Hindu law and had been accepted and acted upon by the Hindus of the Benares School, and attention was drawn to the fact that in Madras and the Panjāb and in Bombay according to Mr. Mandlik, and also in Lower Bengal, if two of the early cases related to that province and if a statement of Golap Chandra Sarkar was well founded, the alleged prohibition had not

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been universally accepted or acted upon by Hindus of the regenerate classes.

In approaching a consideration of any disputed question of Hindu law it is well to bear in mind what Sir William Macnaghten truly said in his Preliminary Remarks (pages VI, VII and VIII of the 3rd Edition) to his Principles and Precedents of Hindu Law; "I apprehend that the Hindu Law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of Pandits has done more. * * *

* * * Authorities are frequently cited in support of a particular doctrine, which are indeed genuine passages of law, but applicable to a question wholly different from the subject-matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular province whose doctrine should have been adopted. Further facility for evasion is gained by the confusion between natural and civil obligations. This is the case in the Hindu Law, especially as it obtains in the province of Bengal. It by no means follows that, because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible."

I may say that from what I had read in Sir William Macnaghten's Principles and Precedents of Hindu Law, in Mr. Sutherland's Synopsis, and in Mr. Mayne's Hindu Law and Usage, I approached the consideration of this appeal under the firm impression that the adoption by Madho Singh of the son of his mother's sister was an adoption prohibited by Hindu law and illegal according to the School of Benares.

The parties in this case are Kshatriyas and are governed by the Benares School of Hindu Law. As Kshatriyas, they belong to one of the three regenerate classes of Hindus. What we have to ascertain is, does the Hindu law as accepted by the Benares School prohibit the adoption by a Kshatriya of the son of his mother's sister, in the sense of making such an adoption illegal and

void. So far as this question of adoption is concerned, on the authorities relied upon on behalf of the plaintiffs, if those authorities are reliable and are to be applied by us, a sister's son, a son of a daughter and a son of a mother's sister stand in the same position; all of them are eligible for adoption or none of them are.

It has not been suggested that there is any evidence in this suit of any usage in these Provinces by which the adoption, in the Dattaka form, of the son of a sister of the mother of the adopter, or of his sister's son or of his daughter's son, amongst any of the three regenerate classes is either recognised as valid or prohibited as illegal. Neither side in this case has pleaded or relied upon any custom or usage. If any such usage exists in these Provinces or in the district of Cawnpore in which the parties to the appeal reside, I have no personal knowledge of it, nor with one exception, that in the case of Bohra Brahmans, to which I shall refer at some length later on, have I any judicial notice of any such usage in these provinces. In order to clear the ground, I may say that I have put the question to the other Judges on this Bench, and that there is not one Judge on this Bench who is able to say of his own personal knowledge that there is any custom in any part of these provinces amongst Hindus of the Benares School which either permits or prohibits an adoption of a sister's son, of a daughter's son or of the son of a mother's sister amongst any of the three regenerate classes of Hindus. It is hardly necessary to say that no Judge on this Bench is a Hindu who is subject to the School of Benares, and in that respect we all stand upon the same footing of Judges alien to the Hindus of these provinces who are subject to the Benares School.

In order to arrive at a conclusion on the important question which we have to decide, I propose to deal with the subject in the following order. I shall begin with the consideration of an argument which has been pressed upon us—that we should, from the paucity of reported cases on this question of adoption in which Hindus who were subject to the School of Benares were concerned, assume that such an adoption as that in this case was by the Hindu law or

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by usages of the Hindus of that school illegal, and as part of that subject I shall express my opinion as to the side on which the onus of proof in this case lies. I shall then consider the ancient texts on this subject, as to which and as to the meaning of which there is no dispute, and which are undoubtedly ancient texts of great authority in the Benares School. I shall then consider whether the Dattaka Mimansa of Nanda Pandita has ever been, as it was stated by Sir William Macnaghten that it was, "an infallible guide" on questions of adoption in the province of Benares, and what its authority in the School of Hindu law of Benares is. I shall then examine the texts on this subject as given in the Dattaka Mimansa of Nanda Pandita and consider how far those texts and his comments on them can be relied upon. I shall then consider the question whether, so far at least as the Hindus of the School of Benares are concerned, the statements and opinions of the English text-book writers, who followed Mr. Sutherland's statement of the law on this question, and who wrote between 1820 and 1830, can be relied upon as accurate statements of the law. I shall then refer to all the reported cases of which I am aware, which throw any light upon this question and in which the parties were Hindus who were subject to the School of Benares; and, lastly, I shall refer to those reported cases in Madras and Bombay on this question of adoption, to the reports of which I have access, and I shall then state the final conclusion on this question before us at which I have arrived.

In the course of the argument we were pressed by the learned vakil for the plaintiffs-respondents to assume, from the fact that there are but few reported cases in which any question arose in the courts as to the legality or illegality of an adoption by a member of one of the three regenerate classes governed by the law of the Benares School of a sister's son, of a daughter's son or of a son of a mother's sister, either that such an adoption was contrary to the Hindu law accepted and acted upon by those subject to the Benares School, or that there exists a custom which prohibits such an adoption. It appears to me that I am not at liberty to make any

assumption based solely on the fact that the legality or illegality of such an adoption amongst Hindus of any of the three regenerate classes has seldom, so far as the reports show, been the subject of litigation between Hindus subject to the School of Benares; and further, that if I did on such materials make any assumption one way or the other, it would just as likely be wrong as right. For all I know, such adoptions may have been of frequent occurrence and seldom questioned, or may have been of infrequent occurrence, and each such adoption may have been questioned in a court of law. Instances of such adoptions having been treated as valid by those whose interest it was to dispute them may have been sufficiently numerous to deter others from questioning their validity notwithstanding the prohibition of Nanda Pandita and the non-judicial opinion of Sir William Macnaghten. On the other hand, instances of such adoptions having been made may, from causes other than the existence of a prohibition, have been infrequent. Many Hindus we know are influenced by a desire to keep ancestral property in their particular *got*. When Judges are in ignorance of the fact, it is not only useless but dangerous to indulge in speculations as to what may or may not be the usages amongst Hindus of a particular school, or of Hindus in a particular province or in a particular district. There would be absolutely no certainty as to the correctness of judicial decisions if Judges were to make assumptions on such materials as the infrequency of litigation concerning matters as to which there was no proof of custom one way or the other, and as to which the general law affecting the matter was not otherwise ascertained or ascertainable. On many other subjects which might come before us we might be pressed with the fact that on such materials we had in this case made an assumption as to the civil and religious rights of the parties, and might be asked in other cases not affecting Hindus or the law of adoption to make assumptions on similar materials. One fact is of more value than a thousand assumptions and will show how unreliable is the argument which is founded on the paucity of reported cases. The Bohra Brahmans are a wealthy subdivision of the Brahman caste in these provinces, possessing much property. In two suits which came in

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appeal before another Judge of this Court and myself in 1891 (*Chain Sukh Ram v. Parbati* and *Mansa Ram v. Sundar*) (1) and to which I shall refer at more length later on, it was proved beyond doubt to the satisfaction of the Hindu Subordinate Judge and of this Court, by witnesses from Delhi and from no less than eight districts of these provinces, that there existed a usage amongst Bohra Brahmans by which the sons of sisters were validly adopted. In that case there were only two instances of such adopted sons not succeeding to the property of the men who had adopted them, and in one of them the adopted son had received from the other members of the family a substantial sum of money for foregoing his claim. There was not the slightest doubt that the Bohra Brahmans of that suit were Hindus and a subdivision of the Brahman caste, although separated from Brahmans as a body. The validity of the same adoption, that of one Prem Sukh by one Baldeo Sahai, had been challenged in a suit which came on appeal before the Court in 1885 (*Parbati v. Sundar*) (2), and was before the Privy Council in appeal in 1889 (*Musammat Sundar v. Musammat Parbati*) (3). In all three suits those who challenged the adoption of Prem Sukh did so on the ground that the parties being members of one of the three regenerate classes of Hindus, the prohibition of the Dattaka Mimansa of Nanda Pandita applied to the adoption. Quite recently, and in reference to the bearing of that litigation upon the argument which I am considering, it was suggested that Bohra Brahmans may have been converts to Hinduism from Muhammadanism, although I have always understood that no man could be a Hindu who had not been born a Hindu. However that may be, the only foundation for that suggestion was that apparently the Bohra Brahmans who had continued to reside in Gujrat had, like many Brahmans in other parts of India, become converts to Muhammadanism, which is quite another thing. If those suits, which related to one and the same adoption, had not been brought, we should probably have been asked to infer, from the fact that the Bohra Brahmans are as a body possessed of much valuable

(1) I. L. R., 14 All., 53.

(2) I. L. R., 8 All., 1.

(3) L. R., 16 L. A., 186.

property, and from the fact that there was no reported case in which the question as to the power of Bohra Brahmans to validly adopt a sister's son was raised, that they were governed by the Dattaka Mimansa of Nanda Pandita, and that adoptions of sister's sons had never taken place amongst them.

Fortunately their Lordships of the Privy Council have in the passage which I shall quote from their judgment in *The Collector of Madurai v. Mootoo Ramalinga Sathupathy* (1), stated what the duty of European Judges administering Hindu law is. The passage is as follows:—"The duty, therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage* will outweigh the written text of the law." (The italics are mine.) It has been contended in this case, on behalf of the plaintiffs, that there is no "disputed doctrine" in this case, that the statements of Nanda Pandita as to the law in his Dattaka Mimansa are conclusive, and that it is for the defendant to prove a usage exempting him from the prohibition of Nanda Pandita in that Mimansa, and not for the plaintiff to prove that the Dattaka Mimansa of Nanda Pandita has been accepted as a binding authority on this question by the School of Benares, or that by a usage amongst the Hindus of that school the general right of adoption has been limited and such adoptions as that in this case have been prohibited. In support of that contention it has been argued on behalf of the plaintiffs that a doctrine is not a "disputed doctrine" within the meaning of the passage which I have quoted from the judgment of their Lordships of the Privy Council if a text can be found quoted by a modern commentator as a text of an ancient authority of the Hindu law which, as quoted, either unequivocally announces the doctrine or has been construed by that modern commentator as announcing the doctrine, although the authenticity

(1) 12 Moo. I. A., at p. 436.

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of the alleged text is disputed and there is good reason to doubt its authenticity, or the corrections of the construction placed upon it. That to my mind is a vicious argument. It is based on assumptions which for the purposes of arguing his client's case a counsel might put forward, but which cannot be made by a Judge and used by him as the basis, not of a forensic argument, but of a judicial decision. It assumes that the text is an ancient text, that it stands alone, or if there are other ancient texts on the same subject that it is in harmony with them and does not qualify them or limit their application, and that it has been rightly construed by the modern commentator and that his construction has been accepted by the School of Hindu Law in which it is sought to be applied. It is obvious to me, for instance, that if one ancient and admitted text permits an adoption without a particular limitation and if another ancient and admitted text imposes that particular limitation on the right of adoption, the two texts are in conflict and there is a disputed doctrine. If the limitation is prohibitive, an adoption which would be valid under one text would be invalid under the other. The two texts would not admit of the same construction and there would be a disputed doctrine.

What is sought by the plaintiffs in this suit is a declaration that Madho Singh, by reason of his having been a Kshatriya, was incapable of validly adopting the son of his mother's sister, and consequently that the adoption of the defendant Bhagwan Singh by Madho Singh was illegal and void. The consequences of our hastily making such a declaration are so wide-reaching as to make it necessary that we should proceed with the greatest care and circumspection. The principle and the authority, if they can be relied upon, upon which we are asked to make that declaration, apply equally to every adoption of a sister's son and of a daughter's son as to adoptions of the son of a mother's sister, amongst those of the three regenerate classes, who either in these provinces or other parts of India, are subject to the Hindu law of the Benares School. The result of such a declaration, unless it were justified by the Hindu law of the Benares School, or by clear proof

usage, would be to arbitrarily limit the right of adoption of recognised by Manu, and other Rishis, and by Hindu commentators, such as the author of the Mitakshara, who are and have been for ages indisputably accepted by Hindus of the Benares School as of paramount authority; it would also cast a doubt upon the efficacy of the funeral and other rites which have been performed by adopted sons, who happened to have been the sons of a sister, of a daughter or of a mother's sister of the adopter, when the adopter belonged to one of the three regenerate classes, in obtaining the release of the soul of the adopter and of the souls of his ancestors from *put* or the hell of the Hindus. Such a declaration would deprive the defendant Bhagwan Singh of all right in reversion to the property claimed in this suit, and would cast doubt upon the title of every such adopted son to the property which he had obtained from his adopting father on the strength of the adoption having been valid.

It appears to me that these plaintiffs claiming such a declaration limiting the right of adoption must, in order to succeed, either rely upon an undoubted text of the sacred law of the Hindus of the Benares School prohibiting such an adoption, or must give clear proof of usage amongst the Hindus of the Benares School excluding and invalidating such an adoption, or, what would be in effect the same thing, must clearly prove that the views as to such an adoption being illegal of a commentator on the Hindu law have been generally accepted and acted upon as correct expositions of the Hindu law on the subject by the Hindus who are subject to the Hindu Law of the Benares School.

A commentator on Hindu law is not a lawgiver and has no more authority to alter the text of the Hindu law or to prescribe limitations of the Hindu law of adoption than has any other member of the public. I think in that proposition every orthodox Hindu will agree. The commentary may or may not be intrinsically valuable as a guide to the true construction of the sacred texts of the Hindu law, but it is not itself a sacred text. The opinion propounded in the commentary may lead to the growth and establishment of a usage in accordance with the views so expressed,

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although such views limit the right under the ancient text, and in such case "clear proof of usage will outweigh the written text of the law." The Hindu law contains admonitions against the doing of some acts, and positive prohibitions against the doing of other acts. Acts which are positively prohibited are illegal in Hindu law and do not in these provinces effect their object. An act contrary to what is an admonition and is not a positive prohibition may be sinful, but it is neither illegal nor ineffective. The ancient texts of the Hindu law were written according to a system. If they had not been so written it would be frequently impossible to decide whether the doing of a particular act was positively prohibited or was merely admonished against in the text as being a moral sin. The Mimansa of Jaimini, to which I shall have to refer later on, tells us what are the rules in this respect for the construing of ancient sacred texts of the Hindus.

Assuming for present purposes the factum of the adoption, the onus of proving that the adoption was illegal and invalid is in my opinion upon the plaintiffs, and for these reasons: Manu and the author of the Mitakshara suggest no such limitation of the right of adoption; that sonless Hindus of all classes may adopt a son is beyond question; it is for those who would limit the right of adoption in this case to point to an undisputed and unambiguous sacred text of the Hindu sacred law, if there is one, recognised and acted upon by the School of Benares, or to give clear proof of a usage amongst the Hindus of that school, which limits that right of adoption by making such an adoption as that in the present case illegal; on the assumption that the adoption has in fact taken place, it is for the plaintiffs, who claim a declaration that the adoption was illegal and void, to prove that such an adoption is illegal. It would not be sufficient to prove that the adoption was merely sinful. If the adoption was merely sinful the principle of the maxim *quod fieri non debet factum valet* would apply and the adoption would, although sinful, be valid for all purposes. On the other hand, if an admitted text of the Hindu sacred law of the particular school prohibited an adoption except under certain specified circum-

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stances, the onus of proving that such a prohibited adoption was by usage valid would be upon the party relying upon such an adoption. Such was the case in *Tulshi Ram v. Behari* (1) in which, contrary to the admitted text of Vasishtha, "Nor let a woman give or accept a son except with the assent of her lord," it was contended that amongst Hindus subject to the School of Benares, in which school the text which I have quoted is received as an admitted text of Vasishtha, an adoption made by a widow to her deceased husband without his express authority was valid. In that case, after referring to cases which had been decided and in which the parties were Hindus subject to the School of Benares (one of those cases was a case from these provinces in the Privy Council) I said, and I think rightly :—"I would expect that any one who would now contend that a Hindu widow subject to the Benares School could make a valid adoption to her deceased husband without express authority given by him, would support that contention by clear proof of general usage in the particular district that an adoption under such circumstances was in the particular district recognised as valid by those subject to the Benares School." In the latter case, that of an adoption of a son by a wife or widow to her husband, a text accepted and admitted to be genuine by the School of Benares imposed in prohibitive language the limitation on the general right to adopt, whilst in the case under consideration in this appeal a limitation on the general right to adopt is sought to be imposed first by a text alleged to be a text of Sakalya, but which has never been recognised as genuine by any commentator of authority of the School of Benares, and secondly by Nanda Pandita's construction of two portions of a text of Saunaka, a construction which has never been accepted as correct by any commentator of authority in the School of Benares, unless indeed it be assumed that Nanda Pandita is in the School of Benares a commentator of authority. I hope to show that any such assumption would be rash in the extreme, and would not be justified by the facts. If it was permissible for a Judge to make assumptions without justification, the onus of proof would depend on the caprice, bias or lack of information or of consideration

(1) I. L. R., 12 All., 328.

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of the particular Judge, and not upon principles of law applied to facts which have been either proved or admitted or of which a Judge is allowed to take judicial notice. In such case the rights of litigants might depend upon the means of knowledge of particular facts relied upon by the Judge as of his own knowledge but which were not proved by evidence or admitted by the parties, and it might appear if the Judge were in the witness box that his knowledge "depended upon mere rumour or hearsay, and that his evidence as to these facts would not have been admissible if he had been examined as a witness." "A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts," and "his own knowledge and belief on public rumour" are "grounds upon which no Judge is justified in acting." (See the judgments of their Lordships of the Privy Council in *Hurpurshad v. Sheo Dyal* (1) and in *Meethun Bebee v. Busheer Khan* (2). I have made the above observations because it has appeared to me that there was a danger in this case of our imposing the onus of proof upon the wrong parties owing to some of us, myself amongst the number, having been at the commencement of the arguments influenced by preconceived extra-judicial opinions, which, so far as I am concerned, did not rest upon any sure foundation.

Before considering what is the authority to be allowed to the Dattaka Mimansa of Nanda Pandita in this matter, I shall briefly refer to the Hindu text law on this subject as it was known before Nanda Pandita wrote that commentary.

Amongst the earliest of those Rishis to whom the Dharmasutras are attributed was Vasishtha. The holy Yama and Saunaka were of the Sutra period as was also Narada. Whether Manu preceded Vasishtha or came after him, the Code of Manu, as we now have it, contains quotations from Vasishtha. Next in authority and order of date to Manu came Yajnyavalkya. According to Mr. Mayne, the work of Yajnyavalkya "is more than 1,400 years old, but how much older it is impossible to say." Sitting here as a Judge to decide

(1) L. R., 3 I. A., at p. 286.

(2) 11 Moo. I. A., at p. 221.

a question of Hindu law between Hindus it is not for me to express an opinion as to the personality of Manu. It is sufficient to say that orthodox Hindus accept the laws of Manu as having been divinely inspired, and that Manu states that he received the code from Brabma and communicated it to the sages. That in its present form it is not as it originally was is probable. Sir W. Jones places the Code of Manu in its present form as early as 1280 B. C. So far as I am aware it has not been suggested by any one capable of forming an opinion that it is of a later date in its present form than about 200 B. C. Mr. Mayne, in paragraph 20 of his *Hindu Law and Usage*, 5th edition, says correctly: "The Code of Manu has always been treated by Hindu sages and commentators from the earliest times, as being of paramount authority; an opinion, however, which does not prevent them from treating it as obsolete whenever occasion requires." There can be no doubt that in the Benares School of Hindu law the Code of Manu always was and still is of paramount authority.

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An adopted (Datrima) son is referred to in the 141st, 142nd 159th and 168th slokes of Chapter IX of the Code of Manu. The 168th sloke as translated by Dr. Bühler, (*Sacred Books of the East*, Vol. XXV, page 361) is as follows:—"168. That (boy) equal (by caste) whom his mother or his father affectionately give, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)."

Beyond the limitation contained in the 168th sloke, Manu in no way imposed any limitation on the adoption of a son in the *Dattaka* form of adoption.

As to adoption Vasishtha in slokes 1 to 10 of Chapter XV, as translated by Dr. Bühler (*Sacred Books of the East*, Vol. XIV, pages 75 and 76) says:—

"1. A man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause.

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2. (Therefore) the father and the mother have power to give, to sell, and to abandon their (son).

3. But let him not give or receive (in adoption) an only son.

4. For he (must remain) to continue the line of the ancestors.

5. Let a woman neither give nor receive a son except with her husband's permission.

6. He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt-offerings in the middle of the house, reciting the Vyahritis, and take (as a son) a not remote kinsman, just the nearest amongst his relatives.

7. But if a doubt arises (with respect to an adopted son who is) a remote kinsman, (the adopter) shall set him apart like a Sudra.

8. For it is declared in the Veda, 'Through one he saves many.'

9. If, after an adoption has been made, a legitimate son be born, (the adopted son) shall obtain a fourth part.

10. Provided he be not engaged in (rites) procuring prosperity."

The 3rd of the above slokes contains what read with the 4th sloke has been held by some Courts as a positive prohibition against the adoption of an only son and by this Court and some Judges of other Courts as an admonition only against the adoption of an only son.

The 5th sloke has been the cause of diversity of opinion amongst the Courts in India.

There is not one word in Manu or in Vasishtha implying that a sister's son, a daughter's son or the son of a mother's sister may not be lawfully and validly adopted. It was admitted during the arguments in this case that there is not one word in Yajnyavalkya suggesting that a sister's son, or a daughter's son or the son of a mother's sister may not be lawfully and validly adopted. Yajnyavalkya is an undoubted authority in the school of Benares.

It has been assumed on the authority of Sir William Macnaghten (Principles And Precedents Of Hindu Law, vol. 1, p. 67) that according to Narada a son of a woman whom the adopter could not have married, such as the son of a sister or the son of a daughter, could not be legally adopted amongst the three regenerate classes. Professor Jolly has translated the Narada Smriti and we have his assurance at page 162 of his Outlines of an History of the Hindu Law, that such a rule does not occur in either of the two versions of the Narada Smriti.

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As to Yama Mr. Mandlik in his Vyavahāra Mayūkha at page 483 says that the Sarasvativilasa quotes a text of Yama which he gives in Sanskrit and which when translated is as follows:—
“In the case of a daughter's son and a brother's son, the rule with regard to a sacrifice and the like does not prevail (The act of adoption) is complete by a verbal gift alone. So says the holy Yama.” Mr. Mandlik says that the same text was subsequently, on the authority of the Sarasvativilasa, quoted in the Dattaka Darpana of Dvaipayana and was adopted by the Sastri of the Bombay Sudder Dewani Adalat in *Huelut Rao Mankur v. Gorind Rao Bulwant Mankur* (1). A slightly different reading of the same text of Yama is given by Golap Chandra Sarkar at page 334 of his Hindu Law of Adoption from his recollection of the text as taught by Pandit Bharat Chandra Siromani to his pupils. Golap Chandra Sarkar gives the translation of the text as remembered by him as follows:—“It is not expressly required that burnt-sacrifice and other ceremonies should be performed on adopting the son of a daughter, or of a brother, for it is accomplished in those cases by word of mouth alone.” That text of Yama distinctly recognised without any qualification or limitation the right of a Hindu to adopt his daughter's son.

The Mitakshara, which is the commentary having as a commentary paramount authority in the Benares School of Hindu Law, treats to some extent of adoption, but, so far as I have been able to ascertain, it does not contain one single word which could suggest

(1) 2 Borradaile, 87.

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that the adoption of the son of a sister, of a daughter or of a mother's sister was prohibited amongst any class of Hindus. Mr. Mayne says in paragraph 26 of his *Hindu Law and Usage*, 5th ed.: "Far the weightiest of all the commentaries is that by Vijnanesvara known as the *Mitakshara*. Its authority is supreme in the City and Province of Benares, and it stands at the head of the works referred to as settling the law in the South and West of India." The age of the *Mitakshara* has, according to Mr. Mayne, following West and Bühler (*Mayne's Hindu Law and Usage*, 5th ed., paragraph 26), been fixed by recent research to be the latter part of the eleventh century. It seems to me to be in the highest degree improbable, if any text of the Hindu Law recognised by the School of Hindu law of Benares had contained any direct prohibition, or any text which was construed by that school as indicating a prohibition, against adoptions by any classes of Hindus of a sister's son, or of a daughter's son, or of the son of a mother's sister, that the *Mitakshara* should be entirely silent on such an important limitation of the right of adoption.

I shall reserve what I have to say as to Saunaka and Sakalya until I am dealing with the *Dattaka Mimansa* of Nanda Pandita as it is upon two sentences of a text of Saunaka and upon a text given by him as a text of Sakalya that Nanda Pandita in his commentary bases his assertion that amongst the three regenerate classes, a sister's son, a daughter's son and the son of a mother's sister cannot be adopted.

Unless the construction put upon the text from Saunaka by Nanda Pandita be correct and unless the text given by Nanda Pandita as from Sakalya can be relied upon and is a full and complete text, not one single text from the sacred law of the Hindus, and not one passage from any commentator anterior in date to the time when the *Dattaka Mimansa* of Nanda Pandita and the *Dattaka Chandrika* were written have been put before us, or, so far as I am aware, exist, which could suggest that a member of any one of the three regenerate classes was prohibited from adopting a son of a sister, of a brother, or of a mother's sister.

It is within my experience that it is apt to be assumed that a Hindu Commentator has been accepted as an authority by a particular School of Hindu law if his views on some subjects are found to be in harmony with doctrines of that school. I confess that I have before now made such an assumption. To my mind no more dangerous assumption could be made. The views of the wildest, most inaccurate and most pedantic of commentators would on many subjects probably be found to be in harmony with doctrines admittedly orthodox. It has also sometimes been assumed that a Hindu Commentator is an accepted authority of a particular School of Hindu law because he was born or lived within the district in which the doctrines of that school of law prevailed. In the sacred city of Benares learned men of every school of Hindu law have resided and are to be found. In the case of Nanda Pandita the above assumptions have been made. Nanda Pandita, although he was born in Benares and although he and his family resided in Benares, came, so far as can be ascertained, of a family from Bedar in Southern India which had settled in Benares. Whether Nanda Pandita's family was an old family of Benares, or had come to Benares from Southern India, or elsewhere, it is certain that on some important questions relating to the law of adoption the opinions of Nanda Pandita have been held not to be in accordance with the doctrines of the School of Benares.

Before considering the text of the Dattaka Mimansa it is necessary to consider whether the authority of that commentary is so supreme as it was assumed to be by Sir William Macnaghten when, in referring to the Dattaka Mimansa and the Dattaka Chandrika, he said :—"They are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares." I have been unable to ascertain upon what authority Sir William Macnaghten made that statement in his Preliminary Remarks to his Principles and Precedents of Hindu Law. He was no doubt a diligent student of Hindu law, and whilst he was the Registrar of the Sudder

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Dewani Adalat in Calcutta he carried through the press three volumes of Reports of decided cases. It will appear, I think, from what I shall say later on that Sir William Macnaghten adopted an erroneous view of Mr. Sutherland's on this question of adoption.

It may be doubted from paragraph 30 of the 5th edition of Mr. Mayne's Hindu Law and Usage whether Sir William Macnaghten, then Mr. W. H. Macnaghten, had, when he wrote on the subject, a correct idea of the authority to be allowed to the Dattaka Mimansa or to the Dattaka Chandrika, and it would appear that he and Mr. Sutherland, who translated the Dattaka Chandrika, were under a misapprehension as to the authorship of that commentary.

On some questions the Dattaka Mimansa of Nanda Pandita is in accord, and not in conflict, with the texts and doctrines of the School of Benares, and such authority, if any, as it ever possessed in that school of Hindu law is, I believe, attributable to that fact, and is confined to those questions on which it is in harmony with the texts and doctrines of the Benares School.

It is certain that on some most important and vital questions relating to the law of adoption the doctrines of the Dattaka Mimansa of Nanda Pandita have not been followed; as, for instance, by their Lordships of the Privy Council on the question as to whether when there is a brother's son eligible for adoption a person who was not a brother's son can be lawfully adopted in *Srimati Um v. Deyi v. Gokoolanund Das Mahapatra* (1), in which case it was held that the texts of the Dattaka Mimansa of Nanda Pandita and the texts of the Dattaka Chandrika, which, their Lordships (at page 50 of the report) said, "do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person," have not the force of law; and by this Court, which has in nearly all questions of Hindu law to administer the Hindu law of the Benares School, on the question as to the adoption of a Brahman aged more than five years in *Ganga Sakai v. Lekhrāj*

(1) L. R., 5, I. A., 40.

Singh (1), on the question whether a widow can under any circumstance adopt a son to her husband after the husband's death in *Tulshi Ram v. Behari Lal* (2), and in other cases; and on the question of the adoption of an only son in *Beni Prasad v. Hardai Bibi* (3).

The authority of the Dattaka Mimansa was discussed by Mr. Justice Mahmood in *Ganga Sahai v. Lekraj Singh* (4), and by me in *Beni Prasad v. Hardai Bibi* (5). In *Tulshi Ram v. Behari Lal* (2), Mr. Justice Mahmood assigned to the Dattaka Mimansa of Nanda Pandita a place of authority in the Benares School as "a book of reference" on the Hindu law of adoption. (See page 342 of I. L. R. 12 All.). When that case was before this Court I had not carefully considered what the authority of the Dattaka Mimansa of Nanda Pandita really was. In that case, although I agreed in the judgment of Mr. Justice Mahmood, I mainly relied upon decided cases in which the parties had been Hindus subject to the Benares School. At the time when the case of *Tulshi Ram v. Behari Lal* was before this Court it was assumed by this Court, but incorrectly, that their Lordships of the Privy Council had in *the Collector of Madura v. Ramalinga Sathupathy* (6), accepted the statement of Sir William Macnaghten that the Dattaka Mimansa of Nanda Pandita was an infallible guide in the Province of Benares on questions of adoption. (See pages 341 and 342 of I. L. R. 12 All.). The incorrect assumption that their Lordships of the Privy Council had adopted the opinion of Sir William Macnaghten, which I have already quoted, influenced, I believe, Judges of this Court and it certainly influenced me until quite recently. In *Beni Prasad v. Hardai Bibi* (3), we were pressed with the argument that we were bound as a Court subordinate to the Privy Council to attach great importance to the fact that their Lordships of the Privy Council had referred to the opinion of Sir William Macnaghten and had not expressed any dissent from it. That argument induced me in that

(1) I. L. R., 9 All., 253.

(2) I. L. R., 12 All., 328.

(3) I. L. R., 14 All., 67.

(4) I. L. R., 9 All., at pp. 318,

319, 322 *et seqq.*

(5) I. L. R., 14 All., at p. 81 *et seqq.*

(6) 12 Moo. I. A., 697.

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case to allow a position of higher authority to the Dattaka Mimansa of Nanda Pandita in the School of Benares than I now, on fuller consideration and after further research, believe it to be entitled to.

The two most celebrated translators from Sanskrit into English of works on Hindu law and the two most celebrated writers on subjects of the Hindu law in the early years of this century were Mr. Colebrooke and his nephew Mr. Sutherland. Mr. Colebrooke was Judge of Mirzapur in 1796 and was in 1801 a Judge of the Sudder Court at Calcutta. In 1796 Mr. Colebrooke published his translation of the Digest of Hindu Law, which is generally known as Colebrooke's Digest. In 1810 Mr. Colebrooke published his translation of the Mitakshara. In Mirzapur Mr. Colebrooke was in the midst of Hindus who are subject to the School of Benares. Mr. Sutherland was in 1815 a Judge at Bhágalpur in Bengal. Bengal Proper, according to Sir William Hunter's Imperial Gazetteer of India (see title "Bengal") is the country which stretches south-east from Bhágalpur to the sea. As the term "Bengal" was used by Mr. Colebrooke, it did not include Mithila (Benar) or the Province of Benares. Mr. Sutherland had prior to 1815 held various subordinate offices connected with the courts. In 1819 Mr. Sutherland wrote his preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika. He was then stationed at Monghyr, which is in Bengal. For some years prior to 1812 Mr. Colebrooke and Mr. Sutherland had been corresponding with Sir Thomas Strange on questions of Hindu law, and had been supplying him with references to cases on Hindu law in different courts, with opinions of Pandits on questions of Hindu law and with their own remarks upon such opinions (see Sir Thomas Strange's Preface to his Hindu Law and the cases, opinions and correspondence printed in the second volume of that work, edition of 1830). One of the greatest authorities in the school of the Daya Bhaga, which is the prevailing school of Hindu law in Bengal Proper, was Jaganatha Tercapanchanana. At some time between 1770 and 1796 he compiled, under the superintendence of Sir William Jones, the Digest of Hindu Law, the

translation of which Mr. Colebrooke published in the latter year. According to Mr. Sutherland's Preface of 1819 to his Translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika, the Dattaka Chandrika was supposed to have been the groundwork of Nanda Pandita's Dattaka Mimansa. If the Dattaka Chandrika or the Dattaka Mimansa of Nanda Pandita or their prohibition of the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister were accepted as of authority in Bengal Proper or in the Province of Benares, it is impossible that the fact should have been unknown to Jaganatha Tercapanchanana and to Sir William Jones when Colebrooke's Digest was being compiled; it is also impossible that the fact should have been unknown to Mr. Colebrooke when he was translating that Digest in and prior to 1796 and when in 1810 he published his translation of the Mitakshara: and it is also impossible that the fact should have been unknown to Mr. Sutherland when in 1819 he wrote his preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika. I hope to show that the Dattaka Mimansa of Nanda Pandita, the Dattaka Chandrika, and this alleged prohibition of the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister were not recognised as authoritative by Sir William Jones and Jaganatha Tercapanchanana when Colebrooke's Digest was being compiled; were not recognised as being authoritative by Mr. Colebrooke when he was translating that Digest; that Mr. Colebrooke in his notes to his translation of the Mitakshara in 1810 does not refer to any such prohibition, and does not suggest that either the Dattaka Mimansa of Nanda Pandita or the Dattaka Chandrika had ever been accepted as of authority in the School of Benares; and that in his Account of the Hindu Schools of Law, which is printed at pages 315 to 319 of the first volume of Sir Thomas Strange's Hindu Law, edition of 1830, Mr. Colebrooke not only does not suggest that the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were or that either of them was a work of authority in the School of Benares, but he in fact assigned them, as works of more or less authority, to another and a different school of Hindu law. I shall also show that so little was known in 1819

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as to the schools of Hindu law, or the districts, in which the rules of the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were accepted and followed, that Mr. Sutherland in 1819, with the reserve of a judicial mind, stated, in the preface to his translations of the Dattaka Mimansa of Nanda Pandita and of the Dattaka Chandrika: "But compiled, as this work has been, under circumstances affording little facility for inquiry or collecting information, he (Mr. Sutherland) has not, from an apprehension of misleading, attempted to debar or restrict the operation of any particular rule to the limits of any particular tract of country: in fact, such precision is scarcely to be attained"—(Stokes' Hindu Law-Books, page 528). I do not know when Sir William Macnaghten wrote his Preliminary Remarks to his Principles And Precedents Of Hindu Law; but that work was first published in 1829. I hope to show that nothing had happened between 1796 and 1829, except the publication of Mr. Sutherland's translation of the Dattaka Mimansa of Nanda Pandita in 1821, to justify, or even to suggest that there was any foundation for, Sir William Macnaghten's statement in his Preliminary Remarks that on questions of adoption the Dattaka Mimansa of Nanda Pandita "is held to be the infallible guide in the provinces of Mithila and Benares." I hope further to show that at no time, the present included, would that statement have been correct in fact, or anything but erroneous and misleading.

The Digest of Hindu Law, which is generally known as Colebrooke's Digest, was compiled by the learned Bengal Pandit Jagannatha Tercapanchanana at the suggestion and under the superintendence of Sir William Jones, and was translated from Sanskrit into English by Mr. Colebrooke in 1796. Mr. Colebrooke was at that time living in Mirzapur. The district of Mirzapur adjoins the district of Benares and the Hindu law of the School of Benares is the Hindu law of the Hindus of Mirzapur. We have thus got in the compiler of the Digest a Bengali Pandit of the highest repute as an authority in the School of the Daya Bhaga of Lower Bengal, *i. e.*, Bengal Proper, on questions of Hindu law and

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have got in the translator of the Digest an eminent Sanskrit scholar, a diligent student of Hindu law and a writer on subjects of Hindu law, who was living within fifty miles of the city of Benares and in the midst of Hindus who were subject to the School of Benares, and we have got the fact that the Digest was compiled under the superintendence of Sir William Jones, and we know that the object of Sir William Jones was that a comprehensive Digest of Hindu Law should, on public grounds, be produced. We also know that Nanda Pandita had resided at Benares and that he had written his Dattaka Mimamsa less than 200 years before the Digest was compiled. We have thus got all the conditions under which, reasonably speaking, it was practically impossible that the Dattaka Mimamsa of Nanda Pandita and its prohibitions could have escaped the attention not only of Sir William Jones but of the compiler and of the translator of the Digest, if that Mimamsa, its doctrines and prohibitions were by the Hindus, or by the learned, in Lower Bengal or in the Province of Benares, considered as of the slightest authority in the School of the Daya Bhaga or in the School of Benares at the time when the Digest was compiled and was translated, which was the last quarter of the eighteenth century. The Digest consists of texts, upon which comments were made by the compiler. Some notes were added by Mr. Colebrooke. Chapter IV of Book V of Part II of the Digest deals with the law relating to sons legitimate and adopted, as a branch of the Hindu law of succession. The Digest treats of the son given, of the age of the son to be given, of the power of parents to give away a son, of the form and ceremony of adoption, of the right of adopting a son if a nephew be living, of the right to maintenance or inheritance of adopted sons, and of various forbidden forms of adoption and of the form then permitted. In reference to the above subjects one or more texts are quoted in the Digest from Manu, Baudhayana, the Caligapurana, Gotama, Vishnu, Sancha, Lichita, Harita, Narada, Yajñawalkya, Devala and Yama. In the compiler's comments on the text set out from those authorities reference is made to the Caligapurana and Pracasa and to Yajñawalkya, Vasishtha, Chandeswara, Manu, Vishnu, Cullūca-

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bhatta, the Retnacara, Vachaspati Misra, Raghunandana, Vachaspati Bhattacharyā, and Medhatithi. If the Dattaka Mimansa of Nanda Pandita was considered to be a work of any authority in Bengal or in the districts subject to the School of Hindu law of Benares at the time when it was being compiled by Jagannatha Tercapanchanana under the supervision of Sir William Jones, or at the time when it was being translated by Mr. Colebrooke, it is most remarkable that there is not one text relating to adoption quoted from either Saunaka or Sakalya and not one single reference made to Saunaka or to Sakalya in any comment of the compiler or note of the translator relating to adoption. If at the time when the Digest was being compiled the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were respected all over India, and the doctrines of the Dattaka Chandrika were adhered to in Bengal and the Dattaka Mimansa of Nanda Pandita was held to be the infallible guide in the Provinces of Mithila and Benares, it is impossible to believe that neither of those commentaries should have been known to Jagannatha Tercapanchanana, to Sir William Jones, or to Mr. Colebrooke, or, if they were known to them as works of any authority in Bengal, in Mithila and in the School of Benares, that their importance, and the importance of the comments on the text of Saunaka and of the text cited as a text of Sakalya should not have been recognised by Jagannatha Tercapanchanana, by Sir William Jones, or by Mr. Colebrooke. In this connection it seems to be advisable to quote a passage from paragraph 32 of Mr. Mayne's Hindu Law and Usage, as it gives the unbiassed and judicially expressed opinion as to the qualifications of the compiler of Colebrooke's Digest entertained by an eminent Hindu Judge, long since deceased, who was subject to the School of the Daya Bhaga, and who is not now concerned with questions of adoption or with the usages, if any, on this subject amongst the members of any caste of Hindus in Lower Bengal. Mr. Mayne after referring to a criticism of Mr. Colebrooke upon the tendency of Jagannatha Tercapanchanana to enter upon frivolous disquisitions and to discuss the opinions of writers of different schools without distinguishing which is the received doctrine of each school or whether any of

them actually prevailed at the time, says:—"This feature drew down upon the Digest the criticism of being 'the best law-book for a counsel and the worst for a Judge.' On the other hand, Mr. Justice Dwarkanath Mitter, who was of the greatest eminence as a Bengal lawyer, lately pronounced a high eulogium upon Jagannatha and his work, of whom he says: 'I venture to affirm that, with the exception of the three leading writers of the Bengal School, namely, the author of the *Daya Bhaga*, the author of the *Daya-tatwa*, and the author of the *Daya-krama Sangraha*, the authority of Jagannatha Tereapanchanana is, so far as that school is concerned, higher than that of any writer on Hindu law, living or dead, not even excluding Mr. Colebrooke himself.' It certainly seems to me that Jagannatha's work has fallen into rather undeserved odium. As a repository of ancient texts, many of which are nowhere else accessible to the English reader, it is simply invaluable. His own Commentary is marked by the minute balancing of conflicting views which is common to all Hindu lawyers. But as he always gives the names of his authorities, a very little trouble will enable the reader to ascertain to what school of law they belong. His own opinion, whenever it can be ascertained, may generally be relied on as representing the orthodox view of the Bengal school."

Mr. Colebrooke published his translation of the *Mitakshara* in 1810. In his notes to the Chapter on Adoption he referred to the views of different schools of Hindu Law and to several commentaries of different schools of Hindu Law, amongst others to Nanda Pandita's *Dattaka Mimansa* and his *Vaijayanti* on *Vishnu*, to the *Vyavahara Mayukha* of the *Maharatta School*, the commentary of *Vachaspati Misra* which is followed by the *Mithila School* and to the *Viramitrodaya*. Neither in his preface nor in his notes to his translation of the *Mitakshara* does Mr. Colebrooke suggest that the *Dattaka Mimansa* of Nanda Pandita was of any authority whatever in the School of Benares, although he refers to it in his preface as "an excellent treatise on adoption." Mr. Colebrooke draws attention to the fact that Nanda Pandita gives in his *Dattaka*

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Mimansa a different reading of one text to that given by him in his Commentary on Vishnu. Mr. Colebrooke points out that Nanda Pandita in his Dattaka Mimansa does not allow any power to a widow to adopt and that Nanda Pandita in the same Mimansa gives in adoption the preference to a nephew. It is obvious that in 1810 Mr. Colebrooke was well acquainted with the Dattaka Mimansa of Nanda Pandita, yet nowhere does he refer to that Mimansa as an authority in the School of Benares, or allude to Nanda Pandita's prohibition of the adoption of a sister's son, of a daughter's son or of the son of a mother's sister. If any such prohibition existed in the Benares School of Hindu Law in 1810, Mr. Colebrooke must have known of it and could not have failed to refer to it. Further it is obvious, to my mind, from an "Account by H. T. Colebrooke, Esq., of the Schools of Hindu Law" which is printed at pages 316 to 319 of the first volume of Sir Thomas Strange's Hindu Law, edition of 1830, that Mr. Colebrooke did not consider the Dattaka Mimansa of Nanda Pandita or the Dattaka Chandrika as a work of authority in the School of Benares. At page 317 he said:—"The School of Benares, the prevailing one in Middle India, is chiefly governed by the authority of the *Mitakshara* of *Vijjyananewara*, a commentary on the institutes of *Yajnyawalkya*. It is implicitly followed in the city and province of Benares, so much so that the ordinary phraseology of references for law opinions of Pandits, from the Native Judges of Courts established there, previous to the institution of Adawlut superintended by English Judges and Magistrates, required the Pandit, to whom the reference was addressed, "to consult the *Mitakshara*," and report the exposition of the law there found, applicable to the case propounded. A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitakshara's* interpretation of the law. It may be sufficient to indicate in this place, the *Viramirodaya* of *Mitra Misra*, and the *Vivada tandava*, and other works of *Camolacara*. They do not, so far as is it at present recollected, dissent upon any material question from their great master. The *Mitakshara* retains much authority likewise in the south and in the west of India. But to that are added, in the peninsula, the *Smriti*

Chandrika and other works bearing a similar title, (as *Dattaka Chandrika*, &c.,) compiled by *Devanda Bhatta*, together with the works of *Madhava Acharya*, and especially the commentary on *Parasara*, and likewise the writings of *Nanda Pandita*, including his *Vaijayanti* and *Dattaka Mimansa*; and also some writers of less note." Then follow the commentaries assigned by Mr. Colebrooke to the west of India, to the east of India, to north Behar or Mithila and to Bengal respectively, the term "Bengal" as used by Mr. Colebrooke not including Behar or Benares. If the judicial caution with which Mr. Colebrooke in his Preface to his Translation of the *Daya Bhaga* and the *Mitakshara* referred to the authority of the *Smriti Chandrika* of *Devanda Bhatta* in parts of India had been imitated by Sir William Macnaghten, when referring to the authority of the *Dattaka Mimansa* of *Nanda Pandita* and of the *Dattaka Chandrika*, so many English readers would not have jumped to the conclusion, without enquiry, that the *Dattaka Mimansa* of *Nanda Pandita* was an authority in the School of Benares. *Devanda Bhatta* and his *Smriti Chandrika* are not to be confounded with the author of the *Dattaka Chandrika* and that commentary.

Mr. Sutherland, who was the first translator of the *Dattaka Mimansa* of *Nanda Pandita*, stated in his Preface, dated Mongeer, 1st July 1819, to his translation:—"The *Dattaka Mimansa* is the most celebrated work extant on the Hindu Law of adoption." Now Mongeer (Monghyr) was the chief town and administrative headquarters of the Monghyr district in Lower Bengal adjoining the districts of Gaya and Patna, which are centres of Hindu religion and of Hindu religious teaching. The *Dattaka Mimansa* was written by *Nanda Pandita*, who was living in Benares in the earlier part of the 17th century, and one of the last of whose commentaries was composed in 1622. It may be assumed that, if the *Dattaka Mimansa* had in 1819 acquired authority in Lower Bengal and was in the Province of Benares treated as an infallible guide on questions of the Hindu law of adoption in the district of Monghyr it must have been well known who its author was, and that he and his family had been residents of Benares. Mr. Sutherland in his Preface of

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1819 having erroneously attributed the authorship of the Dattaka Chandrika to Devanda Bhatta, and referring to the Dattaka Chandrika and the Dattaka Mimansa, said :—" Having said this much, in explanation of the selection made, the Translator would willingly annex some account of the authors, whose tracts are now presented in an English dress. With very limited opportunity, however, he has failed in ascertaining any particulars relative to them, further than that they are both writers of Southern India." In making that statement so far as it applied to Nanda Pandita, Mr. Sutherland must have relied upon erroneous information. It is probable from paragraph 30 of Mr. Mayne's *Hindu Law and Usage* that the author of the Dattaka Chandrika was a native and a writer of Lower Bengal and was not, as Mr. Sutherland had been informed, a writer of Southern India. These misconceptions may seem to some to be matters of small importance. They do not appear to me to be unimportant, when we are asked to accept Mr. Sutherland's statement that "the Dattaka Mimansa is the most celebrated work extant on the law of adoption," implying that it might be accepted as a standard authority at least in that part of India in which Mr. Sutherland wrote his Preface, and also implying that such information as to its author and as to its authority as Mr. Sutherland had received was reliable. I believe that the earliest reported case of adoption in which the Dattaka Mimansa of Nanda Pandita was applied was a case from Masulipatam in 1809, which I have not seen. It is not improbable that its application in that case, and the fact that it propounded rules which had not theretofore been suggested, may have brought it into sufficient prominence amongst the lawyers of Madras as to lead Mr. Sutherland and those upon whose information he relied to the conclusion that Nanda Pandita was a writer of Southern India.

As indicating Mr. Sutherland's views of the application of the Dattaka Mimansa in different districts and its recognition as an authority by the various schools of Hindu law the following passage which I quote from his Preface of 1819 is of importance. He writes :—" In regard to the law of inheritance, important distinc-

tions obtain in the doctrines of the Gaura or Bengal and other schools of law—and this difference has given rise to controversial writing and various tracts, professedly treating on that branch of judicature, as received in the different schools respectively. But the case is not the same in regard to the law of adoption. Some difference of opinion may be indeed observed amongst the individual writers on the subject, but it does not appear that any set of dogmas has been espoused or opposed, as the peculiar doctrine of any particular school. The points on which any difference of opinion obtains are noted in the Synopsis, and the translator has in some instances intimated, what appears to him, the more correct and prevailing doctrine. But compiled, as this work has been, under circumstances affording little facility for enquiry or collecting information, he has not, from an apprehension of misleading, attempted to debar or restrict the operation of any particular rule to the limits of any peculiar tract of country. In fact, such precision is scarcely to be attained." We have the fact that in 1819 Mr. Sutherland did not venture to suggest that on such information as was at his disposal and after such enquiries as he had been able to make, the Dattaka Mimansa of Nanda Pandita or any of its peculiar views were accepted or in force in the province of Benares, in the School of Benares or in any district in which Hindus dwelt who were subject to the Benares School. Yet only ten years later, that is to say in 1829, Sir William Macnaghten wrote that the Dattaka Mimansa of Nanda Pandita was accepted as the infallible guide on questions of adoption in the Province of Benares. What had happened in the meantime, that is between 1819 and 1829, to cause the Dattaka Mimansa of Nanda Pandita to be accepted by the Hindus subject to the School of Benares as their infallible guide on subjects of adoption? Absolutely nothing had happened except that Mr. Sutherland's translation from Sanskrit into English of the Dattaka Mimansa of Nanda Pandita had been published in 1821. How many Hindus of the millions subject to the School of Benares knew in 1821 to 1829 enough English to enable them to read and understand Mr. Sutherland's translation? Probably not twenty. The acceptance by Hindus of the views of a commentator and the

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adapting of their usages to such views are not the work of a day, or of ten years or of twenty. Although usages amongst Hindus vary, and vary materially even in adjoining districts, Hindus are essentially conservative as to their usages, and usages, although they differ, are in most cases the growth of centuries amongst them. More than seventy years have elapsed since Mr. Sutherland's translation of the Dattaka Mimansa was published, and nearly three hundred years have elapsed since that Mimansa was written, and yet on several vital questions of the law of adoption the usages of Hindus subject to the School of Benares remain directly in conflict with the rules of that Mimansa; but we are asked to assume, without one particle of evidence to support the assumption, that on this particular question of adoption, with which we are concerned, the Hindus of the School of Benares have accepted, and submitted to, the rule of Nanda Pandita, and have adopted the usages, which it is said, on the authority of a statement of a gentleman of Calcutta made in some private correspondence which has taken place in reference to this case, but which neither the parties, their legal advisers, nor the Judges of this Bench who are of the majority on this question of adoption have seen, prevail amongst certain classes of Hindus of the Daya Bhaga School of Lower Bengal. I merely point out that if the gentleman in question had been desirous of influencing this Court by a statement as to a fact he should, as he must well have known, have appeared in the witness box to give his evidence. It is hardly necessary to say that the laws and usages of the School of the Daya Bhaga are, as judicial decisions have shown, essentially different on many subjects to the laws and usages of the school of Benares. Mr. Colebrooke, referring to some critic, said, in a note printed at page 320 of the first Volume of Sir Thomas Strange's Hindu Law, edition of 1830, "Can he be ignorant, too, that the Hindu name comprises various nations differing in language and in manners, as much as the various nations of Christian Europe? It is no more to be wondered, that the law should be different in Bengal and Benares, than that it is so in Germany and Spain." See also on this subject of races, Sir John Strachey's "India," and Sir Alfred Lyall's "Asiatic Studies."

In an earlier part of the Preface Mr. Sutherland said :—" The Dattaka Mimansa, as its name denotes, is an argumentative treatise, or disquisition, on the subject of adoption ; and though, from the author's extravagant affectation of logic the work is always tedious, and his arguments often weak and superfluous, and though the style is frequently obscure, and not unrarely inaccurate, it is, on the whole, compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity which it has attained."

It appears to me that a valuable means of testing the authority allowed to the Dattaka Mimansa of Nanda Pandita before it had been translated in 1819 by Mr. Sutherland and of testing the accuracy of Mr. Sutherland's views and of those who followed his lead as to the importance in the Hindu community of that commentary may be afforded by ascertaining how far its precepts were recognised and followed by Courts in the Provinces of the Presidency of Fort William in Bengal before it was translated in 1819 and after it had been in existence for nearly two centuries. The materials for such a test are few, but some exist. It has never been suggested that Sudras were at any time prohibited from adopting a sister's son or a daughter's son. On the contrary, it has by some writers been maintained, I think erroneously, that amongst Sudras the first object of adoption was the sister's or the daughter's son in preference to all others. Similarly it was maintained, but erroneously, by some writers, including Nanda Pandita, that amongst Brahmans when there was a brother's son eligible for adoption the adoption of anyone else would be invalid. Bearing in mind that no text and no author had ever suggested that it was not lawful for a Sudra to adopt a sister's son, or a daughter's son, it may reasonably be assumed that in the case to which I shall now refer the parties belonged to one of the three regenerate classes, for otherwise the reference to the Pandits of the question of adoption was unnecessary. In case XII at pages 185, 186 and 187 of Volume II of Macnaghten's Principles and Precedents of Hindu Law one of the questions asked of the Pandits was whether E having adopted his daughter's son and having died, the adopted son was entitled to succeed to E's property ?

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The answer was:—"If, of the separated brothers, the youngest, having taken his daughter's son in adoption, died, such adopted son is alone entitled to the property to which the deceased was entitled." That case arose in 1808 in zilla Mirzapur in which the Benares School of Hindu Law is supreme. It appears, from cases numbered 58 and 59 at page 18 of Volume I of Morley's Digest of Cases reported in the Supreme Courts of Judicature in India, that in 1810 an adoption by a Brahman of his sister's son was held to be valid, whilst in 1815 it was held that a Brahman could not adopt his sister's son as it imported incest. As in case number 61 at page 19 of the same Digest it is stated that the form of adoption in that case was the Kritrima form, I think it may be safely inferred that the form of adoption in cases numbers 58 and 59 on page 18 was the Dattaka form. I mention the above cases here as showing that prior to the translation in 1819 by Mr. Sutherland of the Dattaka Mimansa the prohibition of the Dattaka Mimansa of Nanda Pandita was not acted upon by the Courts in Bengal in two out of the three cases of which any report has survived, and in which the adoptions would necessarily have been held to have been invalid if at that time the Dattaka Mimansa was adhered to in Bengal.

It will be remembered that Mr. Sutherland when writing in Bengal his Preface to his translations of the Dattaka Mimansa and of the Dattaka Chandrika in 1819 had made inquiries as to who the authors were, and that obviously the only information which he had been able to obtain in Bengal on that point was that the authors were writers of Southern India, the fair inference being that in the opinion of his informants those commentaries were of more authority in Southern India than in Bengal or in Benares. Sir Thomas Strange in a note on a case of 1806 from the zilla of Cuddapah, having referred to the Dattaka Mimansa of Nanda Pandita and to two local commentaries of apparently not much authority, said:—"In practice the adoption of a sister's son by persons of all castes is not uncommon, the authority above quoted resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions."

see Sir Thomas Strange's Hindu Law, edition of 1830, Volume II, pages 100 and 101. It was stated by Holloway, J. in *Narasammal v. Balaramacharlu*, (1) that the note to which I have just referred was by Mr. Ellis. Sir Thomas Strange in his Preface to the first edition of his Hindu Law stated that he had distinguished the Remarks in the Appendix by the letters C., E. and S. as denoting respectively the names of Mr. Colebrooke, Mr. Ellis and Mr. Sutherland. As in the only edition of Sir Thomas Strange's Hindu Law, *vis.*, that of 1830, which contains the Appendix and to which I have access, no initial C., E. or S. is appended to the note to which I have referred, I have assumed that the note was by Sir Thomas Strange himself.

I am aware that some Pandits have cited the Dattaka Mimansa of Nanda Pandita in some cases relating to adoptions amongst Hindus of the Benares School, and it has been contended that from that fact I should infer that the Dattaka Mimansa was received in the School of Benares as an authority to be followed on all questions of adoption, including that which is before us. As a Judge, I am unable to adopt that argument. I do not know and have no information as to the school of Hindu law to which those Pandits belonged. In the Eastern Districts such as Gorakhpur it is as likely as not that such Pandits belonged to, or were influenced by, the School of Hindu law of Lower Bengal, which follows the Daya Bhaga. I am, however, aware that the Pandits in those cases did not agree. I cannot overlook the fact that in Sir William Macnaghten's opinion the venality of Pandits has done more than the speculations of commentators to create confusion in the Hindu law, and that according to his experience Pandits may cite authorities which are genuine and applicable to the particular subject, "but which are of no weight in the particular province whose doctrine should have been adopted." An instance of the truth of that warning was afforded by the Court Pandit of the Provincial Court of Bareilly, in a case to which I shall refer later on, who stated that the Vyavahara Mayukha was in force in the district of Etawah;

(1) 1 Mad. H. C. Rep., 420.

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that statement can only be explained on the ground of the gross ignorance or the shameless mendacity of the Pandit who made it. For all I know other Pandits equally ignorant or equally regardless of the truth may have followed him; if they did, and their statements can be unearthed, we may expect some day to hear it vigorously argued in this Court that the Vyaváhara Mayúkha is the authority to be followed in deciding disputed questions between Hindus of the Benares School. Referring to the Court Pandits of Madras of the latter part of the last and the early part of the present century, Sir Thomas Strange, at pages xxi and xxii of the preface to the first edition of his Hindu Law, said:—"For, with regard to the Pandits, considering the infancy of the judicial establishment provided for the dependencies on the Madras Government at the time when the collection was made, the authority of many cannot be looked upon as very great. The most competent (it may be presumed) were appointed. But in that part of India, and at the time in question, little if any encouragement having been begun to be given to the cultivation of learning among the natives, the field for selection could not be ample. Allowance is also to be made for the possibility of corruption in particular instances, remembering always the declaration of Sir William Jones, 'that he could not, with an easy conscience, concur in a decision merely on the written opinion of native lawyers in any case in which they could have the remotest interest in misleading the Court.'" I shall now quote two of the passages relating to Pandits to be found in Sir Francis Macnaghten's Preface to his Considerations on the Hindu Law. At page x Sir Francis Macnaghten said:—"A majority of the Pandits who have delivered their rescripts declare that the adopted son shall succeed to the estate of his adopting father's father; and they are apparently supported by the most rational construction; yet from the zilla of Saháranpur it is answered that the adopted son is excluded from inheritance by the Mitakshara and all other authorities." The following passage from page xii of Sir Francis Macnaghten's Preface, carefully read, is probably more condemnatory of Pandits than is anything else which he wrote. He said:—"I disclaim all intention of casting a reflection upon our present Supreme

Court Pandits. I have had much conversation with them both, and I believe them to be in all respects better qualified than such men usually are for their offices. Yet it has often been observed that opinions delivered in a particular cause varied from those which had been obtained upon former occasions; and I persuaded myself that it would be more satisfactory at least to ascertain their sentiments at a time when they could not be biassed by favour or by any feelings connected with the parties to an existing litigation." None of us on this Bench, so far as I am aware, either know or have the means of ascertaining what were the characters of the Pandits who, in cases relating to Hindus of the Benares School, cited the Dattaka Mimansa of Nanda Pandita as an authority. Of course it is possible, but hardly probable, that local Pandits in outlying districts of these provinces like Gorakhpur were more learned and more honest than the Pandits of the Provincial Court of Bareilly, than the Pandits of Saháranpur and the other Pandits to whom Sir Francis Macnaghten referred, or than the Pandits who were condemned by Sir William Macnaghten, Sir Thomas Strange and Sir William Jones. I feel that in a case of this importance to the Hindus of the Benares School, in which, if we make assumptions, which are not justified, as to the authority of Nanda Pandita in that school, there is grave risk of our imposing upon the Hindus of the Benares School a custom which may or may not exist amongst the Hindus of Lower Bengal who follow the Daya Bhaga, and which may never have existed in these provinces. I cannot, as a Judge, draw from the fact that in some few cases relating to the Benares School some Pandits, of whose characters I know nothing, cited the Dattaka Mimansa of Nanda Pandita, the conclusion that Nanda Pandita had been received as an authority by the School of Benares.

If we were, from the fact that Pandits in former years cited in Courts in these provinces certain commentaries in support of their statements, to conclude that the commentaries so cited had been accepted by the School of Benares as authoritative interpretations of the law, confusion would be worse confounded and we should be deciding questions between Hindus of the Benares School, not by the

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Hindu law of that school, but by what commentators of another school said, erroneously or otherwise, was the law.

It is said that the following eight commentaries support the opinions on this subject of Nanda Pandita, namely, the Samskara-kaustubha, the Dharmasindhu, the Dattaka Nirnaya, the Dattaka Kaumudi, the Dattaka Darpana, the Dattaka Didhiti, the Dattaka Manjari, and the Dattaka Ciromani. Some of those commentaries are by writers of the School of the Daya Bhaga of Lower Bengal, some by writers of the Mahratha School of the Bombay Presidency, one was, I believe, by a writer of the Mithila School; as to the remainder I do not know of what part of India the writers were, but they were not of these Provinces, or of the School of Benares. All of them were, so far as I can ascertain, subsequent in date to the Dattaka Mimansa of Nanda Pandita. Not one of them was referred to by any one during the hearing of this case. The learned vakil who argued this case on behalf of the defendant had no opportunity of addressing us on any of those commentaries, or as to the authority, if any, which may be allowed to them in the Schools of Hindu law to which their authors belonged. My attention was first drawn to them by a member of this Bench more than a week after the arguments had been concluded and after the case had stood over for judgment. Only three of those commentaries have, in the nine years during which I have been on this Bench, been cited before me in any case, so far as I remember or can ascertain, and then they were not cited as authorities of the Benares School. They were cited as showing the interpretation put upon an ancient text by writers of another school of Hindu law. Of those eight commentaries the following were in one case—*Tulsi Ram v. Behari Lal*, (1)—cited before me, the Samskarakaustubha, the Dattaka Darpana, and the Dattaka Nirnaya. I am not aware that any other Judge on this Bench is in a position to say that any one of those eight commentaries has ever been cited before him as of any authority in the School of Benares, or has in fact ever been cited before him in this Court for any purpose. I am not aware if the text,

(1) I. L. , 12 All, 323.

verified or unverified, of any of those eight commentaries is to be found within these provinces. There is not one Judge upon this Bench who is a Sanskrit scholar capable of translating those texts, or of ascertaining the context, or what those texts in fact say, except my brother Knox. No one on behalf of the defendant, whose interests are at stake here, has had an opportunity of having the texts of those commentaries examined. Under such circumstances I would not venture to allude to them if I did not understand that, in the opinion of one, or possibly two, of the Judges of this Bench, the fact that on the question of adoption before us those eight commentaries of authors of other schools of Hindu law are more or less in harmony with the views of Nanda Pandita, affords a convincing argument that the Dattaka Mimansa of Nanda Pandita is on this question before us the law and the doctrine of the School of Benares. Under such circumstances I must deal with those commentaries as best I can on such scanty materials as are afforded to us by references to them on this subject which I find in the writings of Mr. Mandlik, Golap Chandra Sarkar, and Dr. Jolly. The Samskarakaustubha gives a different version of the text of Saunaka to that given in the Dattaka Mimansa of Nanda Pandita ; it omits that portion of the text which has been translated by Mr. Sutherland thus:—"For the three superior tribes, a sister's son is nowhere [mentioned as] a son." (See Mr. Mandlik's Vyaváhara Mayúkha at page 489). The Dharmasindhu cites the text of Saunaka without referring it to any author. (Mr. Mandlik's Vyaváhara Mayúkha, page 489). The Dattaka Nirṇaya cites the text of Saunaka as a text of Narada (Mr. Mandlik's Vyaváhara Mayúkha, page 489). It appears that the authors of those three commentaries consider that the text of Saunaka, to which I shall refer at length later on, prohibits the adoption of a daughter's son and of a sister's son, and that by those authors "the prohibition is placed on a par with the prohibition as to the giving of the eldest son, and the rule laying down the order of eligible adoptees, both of which have been on all hands admitted to be directory." (Mr. Mandlik's Vyaváhara Mayúkha, pages 488 and 489). Their Lordships of

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the Privy Council in *Srimati Uma Deyi v. Gokoolanand Das Mahapatra*, (1) held that according to Hindu law as it obtains in Benares the adoption of a very distant relation, not included within the sapindas of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood, was valid, and that the texts which prescribe the preferential adoption of such a son have not the force of law. The texts and the principal authority which were relied upon in that case as prohibiting the adoption of the distant relation were texts of the Dattaka Chandrika, texts of the Dattaka Mimansa of Nanda Pandita, and Mr. Sutherland's Synopsis. In *Janokee Debea v. Gopaul Acharjee*, (2), it was held that the adoption of the first-born son though blameable was valid in law. The Dattaka Kaumudi appears to be merely an echo of the Dattaka Mimansa of Nanda Pandita. The Dattaka Darpana excludes the sister's son and the daughter's son from the category of objects of adoption, but apparently says nothing about the son of a mother's sister. The Dattaka Didhiti reads the text of Saunaka differently to Nanda Pandita; it says that a daughter's son and a sister's son should be adopted by Sudras, but it does not say anything about their affiliation by the three regenerate classes, and apparently does not refer at all to the son of a mother's sister. The Dattaka Manjari says:—"Amongst Brahmanas the daughter's and the sister's son are excepted, since they are unfit for being looked upon as sons; and for the same reason the paternal uncle and the like are excluded." I have gathered what I have stated as to the Dattaka Kaumudi, the Dattaka Darpana, the Dattaka Didhiti, and the Dattaka Manjari from page 327 of Golap Chandra Sarkar's Hindu Law of Adoption. According to Dr. Jolly in the Appendix to his Outlines of an History of the Hindu Law the Dattaka Ciromani is an epitome of seven treatises on adoption. Dr. Jolly gives translations of the portions epitomised as they appear in the Dattaka Ciromani, but does not give translations of the passages quoted from the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika, as those works were accessible in an English form. The value of

(1) L. R., 5 L. A., 40.

(2) L. L. R., 2 Calc., 865.

the treatises epitomised on any question relating to the Hindu law of the School of Benares may be gathered from the following facts, assuming that the treatises were correctly epitomised in the Dattaka Ciromani, which may be doubted from the short epitomes on this particular question of adoption given by Golap Chandra Sarkar at page 327 of his Hindu Law of Adoption. According to the epitomes of the Dattaka Ciromani, the Dattaka Darpana allows the widow of a separated Hindu to adopt a son to her husband without having authority from her husband to adopt; the Dattaka Kanmudi permits the adoption of a son whilst another son is living from a desire to have many sons; the Dattaka Didhiti apparently expressed the same opinion and further stated that several men together could adopt the same son; the Dattaka Tiloka says that many sons may be adopted by the same man provided they are all adopted at the same time, and even a married man is fit to be adopted. Much more might be written on the same point. The treatises epitomised may, so far as I am concerned in this case, correctly state the law of adoption of the School of the Daya Bhaga, and I assume from nearly all those commentaries being relied upon by one of my Brother Judges that he considers that they are authorities accepted by some School of Hindu law, but they certainly could not be, nor are they, accepted as authorities in the School of Benares, and it may be assumed that some of them would be repudiated as authorities by the Hindus of Mithila. The result is that in six out of those eight commentaries no mention is made of the adoption of a mother's sister's son, and in one of them there is no prohibition against the adoption amongst the three regenerate classes of a sister's son, of a daughter's son or of the son of a mother's sister. The texts of the Dattaka Chandrika and of the Dattaka Mimansa of Nanda Pandita which were adopted as prohibitory in three of those eight commentaries have on one subject been held not to have the force of law in the School of Benares by their Lordships of the Privy Council, and on another subject have been held by the High Court at Calcutta not to be prohibitive. Neither separately nor collectively do those eight commentaries of authors of other Schools of Hindu law furnish in my opinion the slightest

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ground for assuming that on the question before us the Dattaka Mimansa of Nanda Pandita has ever been accepted as, or ever was, the law of the School of Benares, nor do they suggest to my mind that the interpretation put by Nanda Pandita on the text on this subject cited in his Dattaka Mimansa was correct. That some eight or more commentators, of whose authority, reputation and accuracy of thought we know nothing, followed the lead, more or less closely, of the Dattaka Chandrika or of the Dattaka Mimansa of Nanda Pandita does not prove that Nanda Pandita correctly interpreted the text of Saunaka. It does not appear from the information before us whether any of these commentators accepted the text cited as a text of Sakalya. One solitary native commentator, who I believe was subject to the School of Benares, has followed the lead of the Dattaka Mimansa of Nanda Pandita. That commentator was the parda-nashin lady who resided in Benares and wrote under the name of Balambhatta. I say, without fear of contradiction in this Court, that she is not received as an authority by the School of Benares. *Primâ facie* it would be improbable that the School of Benares, which has produced celebrated scholars and expounders of the Hindu law, should accept as an authority a lady of quite modern times, whose knowledge of the law and of the usages of Hindus in these provinces was confined to such knowledge as she was in a position to acquire when sitting behind the parda in her husband's house.

The three regenerate classes of Hindus of the School of Benares have not hitherto acknowledged that they are bound to accept the usages, or to follow the interpretation of the Hindu law, of those who belong to the School which follows the Daya Bhaga. We, as Judges of this Court, sit here in this case to apply the Hindu law and usages of the School of Benares and not the Hindu law and usages of the School of Lower Bengal or of elsewhere. Under such circumstances it appears to me to be our duty to be particularly careful that we do not impose by our decision upon the three regenerate classes of Hindus in these provinces a prohibition and a religious dogma not to be found in the Hindu law of the School

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to which they are subject, a prohibition which may have originated in an erroneous view of the law taken by two commentators of quite modern times, which may have been followed, more or less closely, by writers who did not belong to the School of Benares, and which was supposed to apply in the Benares School of Hindu law by those who, without sufficient enquiry, accepted as correct the views of those two commentators and the views of their translator.

The result of much careful enquiry into the authority to be allowed to the Dattaka Mimansa of Nanda Pandita has led me to agree with that eminent Sanskrit scholar, Professor Jolly, that : "It is simply a misfortune that so much authority should have been attributed in the Courts all over India to such a treatise as Nanda Pandita's Mimansa, which abounds more in fanciful distinctions than, perhaps, any other work on adoption, and it is high time that the numerous other Treatises on Adoption should be thoroughly examined and given their due weight. Even hitherto, in spite of the pressure exercised by the authority of Nanda Pandita, the prevailing tendency of decisions has been in favour of divesting adoption of arbitrary restrictions, which have no foundation in equity or justice" (Professor Jolly's *Outlines of an History of the Hindu Law*, page 166). I am convinced that down to 1830, the Dattaka Mimansa of Nanda Pandita had not been accepted as an authority in the School of Benares. Since 1830 that Mimansa has occasionally been referred to in the Sudder Dewáni Adálat of these Provinces and in this Court on various questions of adoption, but has not been followed when its rules were in conflict with the Mitakshara or with other authoritative works of the Benares School, except in three cases, to which I shall refer at length later on, in none of which did the Judges enquire whether or not its rules had been accepted by the School of Benares. In the first of those cases a native Munsif found the adoption proved and valid ; the District Judge expressed no opinion about the adoption and decided the case on another point ; the Judges of the Sudder Dewáni Adálat decided, on the sole authority of Mr. Sutherland's statement, that the adoption was invalid, notwithstand-

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ing that the evidence which the Judges accepted as correct, showed that in the opinion of the caste the adoption was valid. In the second case all three Courts held that the adoption was invalid, applying Nanda Pandita's prohibition against the adoption of a sister's son: the curious points about that case are that the question was irrelevant, as the widow had not received authority from her husband to adopt as was found, and the prohibition of Nanda Pandita, although applied, was in fact misapplied, as the boy who was adopted by the widow to her husband was her brother's son and was not a son of a sister of the widow's late husband, and the adoption if it had been with authority would have been valid. In the third case the question of adoption was irrelevant; the curious point in connection with that case is that the parties to that case were parties to subsequent litigation in which it was by evidence proved beyond doubt that the particular adoption of a sister's son by a Brahman was valid, and was in accordance with usage amongst that division of the Brahman tribe.

It must never be overlooked for one moment that Nanda Pandita's sole position in the Hindu law is that simply of a commentator and that he had no power to impose of his own accord burdens and restrictions on the Hindus in the exercise of the right of adoption. His Dattaka Mimansa must be judged as any other commentary would be. I think I succeeded in showing in my judgment in *Beni Prasad v. Hardai Bibi* (1) that Nanda Pandita in construing a material text of Vasishtha ignored the principles of the construction of texts of the Hindu sacred law as prescribed in the Mimansa of Jaimini, and by violating those principles of construction put a construction upon that text which had not been adopted by the much more celebrated author of the Mitakshara.

Nanda Pandita in the Dattaka Mimansa asserts that amongst the three regenerate classes an adoption of a daughter's son, of a sister's son, and of a son of a sister of the mother of the adopter is prohibited. He draws that conclusion from two passages which he quotes from a text of Saunaka, and from a

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passage which he gives as a text of Sakalya; one passage from Saunaka (Çaunaka) is given partly in paragraph 2 of section II, page 547 of Mr. Sutherland's translation of the Dattaka Mimansa in Stokes' Hindu Law Books and partly in paragraph 74 of the same section at pages 563 and 564. It may be mentioned that the Dattaka Mimansa was written in prose and was not in the original divided into sections or paragraphs and was not punctuated. The system adopted in the Dattaka Mimansa was that a portion of a text was given and on it followed Nanda Paudita's comments, and then a further portion of the text was given followed by comments upon it. The text of Saunaka as given in paragraphs 2 and 74 of section II of the translation is as follows:—"The adoption of a son, by any Brahmana, must be made from amongst 'sapindas' or kinsmen connected by an oblation of food; or, on failure of these an 'asapinda,' or one not so connected, may be adopted: otherwise let him not adopt. Of Kshatriyas, in their own class positively: and [on default of a sapinda kinsman] even in the general family, following in the same primitive spiritual guide (Guru): of Vaicyas, from amongst those of the Vaicya class (Vaicyajateshu); of Cudras, from amongst those of the Cudra class. Of all, and the tribes likewise, [in their own] classes only; and not otherwise. But a daughter's son and a sister's son are affiliated by Cudras. For the three superior tribes, a sister's son is nowhere [mentioned as] a son." One version of this part of the text of Saunaka is thus translated by Golap Chandra Sarkar at page 309 of his Hindu Law of Adoption: "Amongst Brahmanas, the affiliation of a son *should be made (Kartavyak)* from amongst *sapindas*; or on failure of them a non-sapinda (may be affiliated); but any other should not be affiliated; amongst Kshatriyas, one from their own tribe, or one whose *Gotra* is the same as that of the adopter's *guru* or preceptor (may be affiliated); amongst Vaisyas from amongst those of the Vaisya tribe; amongst Sudras from amongst those of the Sudra tribe; amongst all classes, from their respective classes, not from others. A daughter's son or a sister's son is, however, affiliated by Sudras; amongst the three (tribes) beginning with the Brahmana, a

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sister's son is not affiliated somewhere (or anywhere)." A translation of a version of this part of the text of Saunaka is given by Mr. Mandlik at page 53 of his Vyavahāra Mayūkha thus:—"Amongst Brahmanas, the adoption of a son should be made from amongst the *sapindas*, or in their absence, an *asapinda* [one not a sapinda] may be adopted, otherwise one should not be adopted; amongst Kshatriyas, one from their own class, or one whose *Gotra* is the same as that of the (adopter's) preceptor may be adopted; amongst Vaisyas, from amongst those of the Vaisya class; amongst Sudras, from amongst the Sudra class; amongst all classes, from amongst their respective classes only, not from others. But a daughter's son and sister's son are affiliated even by Sudras." I infer from a passage at pages 489 and 490 of his Vyavahāra Mayūkha that Mr. Mandlik obtained the text, his translation of which I have quoted, from the text as given in the Vyavahāra Mayūkha. Mr. Mandlik, commenting at page 494 of his Vyavahāra Mayūkha on the latter part of the text of Saunaka as given in the Dattaka Mimansa of Nanda Pandita gives what he vouches as his own and as a correct translation of that part of the text, as it appears in the Dattaka Mimansa, thus:—"Sudras (should) adopt a daughter's son or a sister's son. A sister's son is in some places (not adopted as) a son among the three (classes beginning) with a Brahmana." It would appear from Dr. Bühler's article on the Caunaka Smriti in the Journal of the Asiatic Society of Bengal for 1866, at page 159, that there were known to him at least five different Sanskrit versions of that part of the text of Saunaka which, as given in the Dattaka Mimansa of Nanda Pandita, Mr. Sutherland has translated as "But a daughter's, and a sister's son, are affiliated by Sudras," and that Dr. Bühler was not aware of any version of Saunaka's text, except that given by Nanda Pandita in his Dattaka Mimansa, in which the words which Mr. Sutherland has translated as "For the three superior tribes a sister's son is nowhere [mentioned as] a son" appear.

Mr. Mandlik, at pages 489 and 490 of the Vyavahāra Mayūkha, says in reference to this latter subject:—"This verse although

found in the manuscript copy of Saunaka Kárikás in my library, does not occur in that copy of Kárikás which was available to Dr. Bühler. Nor does it occur in the extract of the adoption chapter of the Kárikás made in the Samskarakaustubha, and in the Vyaváhara Mayukha. These extracts correspond with the manuscript of Dr. Bühler. On the other hand, the Dattaka Mimansa, the Dattaka Chandrika, and my own manuscript of Saunaka Kárikás do give the said text. I am, therefore, inclined to hold with Dr. Bühler that there were two versions of the chapter of Saunaka, the one Maharastra as he calls it, and the other the Gauda or Eastern." Those facts, if there was nothing else, ought to make a Judge cautious in accepting blindly, and without careful judicial consideration, the texts given by Nanda Pandita in his Dattaka Mimansa and his comments upon them. Dr. Bühler was of opinion that it was from the Saunaka Kárikás that Nanda Pandita quoted in his Dattaka Mimansa (See Journal of the Asiatic Society for 1866 at page 150). Commenting on the latter part of that text of Saunaka as given by him Nanda Pandita, according to the translation given by Mr. Sutherland of paragraphs 91, 92, 93, and 94 of section II of the Dattaka Mimansa, (Stokes' Hindu Law Books, page 567) said :—

"91. This part of the text, 'but a daughter's son, &c.' propounds an exception, as to those of the three first tribes, with respect to the daughter's son, and sister's son, inferred from the mention of propinquity in the general.

"92. Since (the particle 'but' having an exclusive import) a restriction 'by Cudras only,' is conveyed; those of the three first tribes are excluded. On this point the author subjoins a reason: 'For the three superior tribes, &c., &c.'

"93. Since the filial relation of a sister's son to one of the three first tribes, is not exhibited in any authority whatever, the passage is relative only to Cudras. This is the meaning of the whole.

"94. The expression, 'a sister's son' is of indefinite import, in the (part subjoined as a) reason; for, (otherwise) it would follow, that it were therein an unmeaning term: or, were it of definite

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import, one portion (of the preceding sentence. *viz.*, 'a daughter's son') would be void of sense."

I confess I find it difficult to make sense out of those paragraphs and the paragraphs which follow them. It appears to me that what Nanda Pandita was trying to demonstrate was that the sentence in Saunaka's text which Mr. Sutherland has translated as;—"For the three superior tribes, a sister's son, is nowhere (mentioned as) a son" was a reason given for the immediately preceding sentence of the text;—"But a daughter's son, and a sister's son, are affiliated by Sudras," and that reading the two sentences together Saunaka had, in the opinion of Nanda Pandita, expressly prohibited the adoption amongst the three regenerate classes of a daughter's son and a sister's son. Assuming for the moment that Nanda Pandita was correct in construing the sentence;—"For the three superior tribes, a sister's son, is nowhere (mentioned as) a son" as the reason for the statement contained in the immediately preceding sentence of Saunaka's text, and applying the rule of construction of the Mimansa of Jaimini, which is to be applied to the ancient Sanskrit text of the sacred Hindu law, the two sentences together must be deemed to contain an admonition only, and not a positive prohibition, against the adoption amongst the three regenerate classes of a sister's son and of a daughter's son. The rule of the Mimansa of Jaimini is thus stated by Mr. Mandlik at page 499 of the Vyaváhara Mayúkha:—"It is a rule of the Purva Mimansa that all texts supported by the assigning of a reason are to be deemed not as *Vidhi* but simply as *Artha-vád* (recommendatory). When a text is treated as an *Artha-vád*, it follows that it has no obligatory force whatever." I have shown in my judgment in *Beni Prasad v. Hardai Bibi*, (1) that the rules of the Mimansa of Jaimini, although they may sometimes have been overlooked or not attended to by Hindu as well as English commentators and text writers, and by English translators, are no new rules of construction but are authoritative rules for the construction of texts of the sacred law of the Hindus. The Mimansa of Jaimini is older by many cen-

(1) I.L.R., 14 All., at pp. 70 *et seq.*

turies than the Dattaka Mimansa of Nanda Pandita. Its authority is undoubted. It has been applied by, amongst others, Jagannatha Tereapanchanana, who compiled Colebrooke's Digest, and is referred to in the notes in that digest. This is what was stated by Mr. Colebrooke as to the Mimansa of Jaimini:—"The written law, whether it be *Śruti* or *Smṛiti*, direct revelation or tradition, is subject to the same rules of interpretation. Those rules are collected in the *Mimansa*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law. In the eastern part of India, *viz.*, Bengal and Behar, where the Vedas are less read, and the Mimansa less studied than in the south, the dialectic philosophy, or *Nyaya*, is more consulted and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics." See Account by H. T. Colebrooke, Esq., of the Hindu Schools of Law in Sir Thomas Strange's Hindu Law, Volume I, page 315, edition of 1830. See also Mr. Colebrooke on the Mimansa of Jaimini, in the transactions of the Asiatic Society, Volume I, page 457. That Mr. Colebrooke in the above extract was when referring to "Bengal" applying that term, not loosely, but strictly according to its true and original meaning of the country stretching south-east from Bhāgalpur to the sea, and was not including in that term Behar or the province of Benares is obvious from the reference in that extract to "Bengal and Behar" and from the following passage, relating to authorities in the different Schools of Hindu Law, in the same Account:—"To these are added, in Bengal, the works of *Jināta Vāhana* and those of *Raghunānda*, and several others, constituting a distinct school of law, which deviates on many questions from that of *Mithila*, and still more from those of Benares, and the *Dekhin*, or southern peninsula." I have shown in my Judgment in *Beni Prasad v. Hardai Bibi* (1) that the author of the Mitakshara had construed a text of Vasishtha in accordance with the rules of the Mimansa of Jaimini, and that the construction of that same text in the Dattaka Mimansa of Nanda Pandita was in violation of those rules. The

(1) I.L.R., 14 All., 67.

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truth is, Nanda Pandita followed no rule of construction, but construed ancient texts as it suited his fancy, or his argument.

The reference to a daughter's son and a sister's son in the text of Saunaka if that text is correctly given by Nanda Pandita, appears to me to be simply a statement of what Saunaka considered to be a fact, namely, that in his time amongst Sudras a sister's son and a daughter's son were sons who were adopted by Sudras and that in the ancient texts of the Hindu law it had not been mentioned that a sister's son might be adopted amongst the three regenerate classes, a very different thing from saying that the adoption of a sister's son was prohibited. It appears to me that Saunaka did not intend to represent that the adoption amongst the three regenerate classes of a sister's son or of a daughter's son was positively prohibited. Some writers have taken a third and a different view of the meaning of that text of Saunaka, and have contended that it means that amongst Sudras a sister's son and a daughter's son must be adopted in preference to others. Saunaka's statement may have been intended to represent that in his days, and in some part of India, so far as he knew, it was not the custom amongst the three regenerate classes to adopt a sister's son or a daughter's son, but it did not in my opinion imply a prohibition. I am led to that conclusion by each of the translations of the text which I have quoted. I also come to the same conclusion from the fact that no such prohibition against the adoption of a daughter's son or of a sister's son is even suggested in the laws of Manu, Vasishtha or in the Mitakshara, whilst Yama, who undoubtedly was a Rishi of great importance in the Hindu sacred law, distinctly recognised without any limitation or qualification the right of a Hindu to adopt a daughter's son. We shall see later on that Nanda Pandita was probably led to misconstrue the text of Saunaka, as it was given by him, by erroneously mixing up the ancient and obsolete practice of Niyoga with the law of adoption, and that Mr. Sutherland in the Synopsis went a step further and confused Niyoga with marriage.

In paragraph 107 of section II of Mr. Sutherland's translation of the Dattaka Mimansa at page 570 of Stokes' Hindu Law

Books a text is given as from Sakalya. Nanda Pandita referred to the text given by him as a text of Sakalya in continuation and in support of his argument on that portion of the text of Saunaka to which I have already referred, and I shall deal with it here, and before considering Nanda Pandita's comments on the other part of the text of Saunaka. The paragraph is as follows; "107. Çakala has clearly laid down the above points: 'Let one of a regenerate tribe destitute of male issue, on that account, adopted (*sic*) as a son the offspring of a sapinda relation particularly: or also, next to him one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sisters.' The following paragraph gives Nanda Pandita's comment on that text; "108. By this it is clearly established, that the expression 'sister's son' (in the last sentence of Çaunaka's text, section 74) is illustrative of the daughter's son and mother's sister's son, and this is proper: for prohibited connection is common to all three. To enlarge would be useless."

It appears to me that if we have before us in paragraph 107 of section II of Mr. Sutherland's translation of the Dattaka Mimamsa the complete text of Sakalya as translated, the words "except a daughter's son, a sister's son, and the son of a mother's sister" are equivalent to "let one of a regenerate tribe not adopt a daughter's son, a sister's son or the son of a mother's sister," and as no reason is given in the text (assuming it to be complete), we must, applying the rules of the Mimamsa of Jaimini, construe the text as positively prohibiting such an adoption. Before, however, coming to the conclusion that a sacred text of the Hindu law has prohibited such an adoption, we must be satisfied that the text as given in the Dattaka Mimamsa is not only a genuine text of the Hindu sacred law, but that it is the complete text, that is, that the original text contained nothing more and gave no reason for the exclusion of a sister's son, a daughter's son, and the son of a mother's sister from the category of persons eligible for adoption; for if the original text contained a reason for the exclusion of the sister's son, the daughter's son, and

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the son of a mother's sister, the original text was admonitory only, and not prohibitory.

Even a casual reader of the text of Saunaka, as interpreted by Nanda Pandita, and of that given as a text of Sákalya on comparing them would notice that whilst the text of Saunaka refers only to a sister's son and a daughter's son, the text given as that of Sákalya refers not only to a sister's son and to a daughter's son, but also to the son of a mother's sister, and the natural enquiry would suggest itself why was no mention made of the son of a mother's sister in the text of Saunaka, who, beyond all dispute was an authority of great importance in the Hindu sacred law? Only two possible answers could be given to that enquiry, one being that when Saunaka wrote he was not aware that any objection existed to the adoption of the son of a mother's sister, which would be improbable if such an objection did in fact exist, particularly on the ground of incest, in Saunaka's time, and the other answer being that in fact no objection to the adoption of the son of a mother's sister did in fact exist in the time of Saunaka. Another matter which on a comparison of those two texts, and bearing in mind the rules of construction of the Mimansa of Jaimini suggests itself is, that whilst the text of Saunaka gives, according to the opinion of Nanda Pandita, a reason, and consequently, if his opinion on that point is correct and the text is anything more than a mere statement of the fact that Sudras adopted a sister's son and a daughter's son, that text must be construed at the utmost as admonitory and not prohibitory, the text given as a text of Sákalya gives no reason, and if the text as given by Nanda Pandita be complete the text of Sákalya must be construed as a positive prohibition of the adoption of a sister's son, a daughter's son, and the son of a mother's sister. Why should an undoubted authority such as Saunaka merely give an admonition not to adopt a sister's son or a daughter's son, and why should Sákalya, if in fact he did, positively prohibit the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister? From what source did Nanda Pandita obtain the text said by him to be a text of Sákalya? That text does not appear in any Veda, Sruti, Smriti, Sutra or Code of the Hindu law which is extant. It

does not appear in any early commentary on the Hindu law, such as the Mitakshara, and appears for the first time, so far as is known, in the Dattaka Chandrika, which apparently preceded at no long interval the Dattaka Mimamsa of Nanda Pandita. Where did the author of the Dattaka Chandrika find that text? Neither the author of the Dattaka Chandrika, whoever he may have been, nor Nanda Pandita, nor any one else has ever told us where the author of the Dattaka Chandrika found that text given as a text of Sakalya. The author of the Dattaka Chandrika found neither that text, nor the prohibition which it implies against the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister, in any sacred book, code or commentary of the Hindu law which is now known to Hindus or to Sanskrit scholars. I find it impossible to believe that no allusion to that text or to the prohibition which it implies against the adoption of a sister's son, a daughter's son, and the son of a mother's sister should have been made in any sacred book, code or commentary of the Hindu law if the existence of that text or of that prohibition had been known before the author of the Dattaka Chandrika first produced it in his commentary. I cannot resist the conclusion either that no such text existed, or, if it did exist, that it was not considered of any authority. It makes illegal the adoption of a daughter's son, whom Yama without any limitation recognises as a person as equally eligible as a brother's son for adoption.

With such absence of all information as to how or where the author of the Dattaka Chandrika found the text, if it had in fact existed, how can we assume that we have before us a complete transcript of an original text of Sākalya? Was this alleged most ancient text generally acted upon as an authoritative text by Hindus? In this connection it should be borne in mind that the Full Bench of the Madras High Court in *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) held that a custom amongst Nambudri Brahmans to adopt a sister's son was established, and in *Fogidinada v. Appu*, (2) that

(1) I. L. R., 7 Mad., 3.

(2) I. L. R., 9 Mad., 44.

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in Southern India a custom exists amongst Brahmans to adopt a sister's son and a daughter's son, and that such custom is valid. In the Panjáb, according to a note at page 1028 of West and Bühler's Digest of the Hindu Law, 3rd edition, which is founded on Tupper's Customary Law of the Panjáb, a sister's son and a daughter's son may be adopted with the consent of the male relations, the objection in the Panjáb to the adoption of a sister's son or a daughter's son arising from their taking the property into another Gotr. The late Mr. Mandlik positively stated that in the Bombay Presidency such adoptions are common, and so far as I am aware that statement publicly made in his Vyavahára Mayúkha has not been publicly contradicted. Golap Chandra Sarkar states that such adoptions are not uncommon in Lower Bengal, but what his authority for that statement was he does not mention, and I give the statement for what it is worth. Those two Full Bench cases in Madras and the fact that such adoptions are permitted in the Panjáb coupled with the statement by Sir Thomas Strange which I have already quoted and with case XII and the cases in Morley's Digest to which I have referred and with the late Mr. Mandlik's statement as to the Bombay Presidency show either that the views as to the law of adoption expressed in the Dattaka Mimansa of Nanda Pandita were not generally accepted as correct, or that in many different parts of India they were unknown to many large bodies of Hindus, or were repudiated as not binding on their consciences. Neither the alleged text of Sákalya nor Nanda Pandita's prohibition is referred to in Colebrooke's Digest. Golap Chandra Sarkar at page 335 of his Hindu Law of Adoption asks a very pertinent question, which might apply in many parts of India, "Has any Brahmana been ever outcasted by adopting his daughter's or sister's son, though instances of such adoption are not rare?" I think it probable that Nanda Pandita took the text from the Dattaka Chandrika. Mr. Sutherland in his Preface of 1819 to his translations of the Dattaka Mimansa and the Dattaka Chandrika (Stokes' Hindu Law Books, page 527) says that the Dattaka Chandrika was supposed to have been the groundwork of the Dattaka Mimansa. The

same text is cited in each as the text of *Sākalya*. It is cited in paragraph 11 of section I of Mr. Sutherland's translation of the *Dattaka Chandrika* at page 631 of Stokes' *Hindu Law Books*. Many of the observations which I have made on Nanda Pandita's comments on the text of *Saunaka* apply equally to his comments on the text quoted by him as a text of *Sākalya*.

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I shall now refer to the other passage in the text of *Saunaka* upon which Nanda Pandita also relied as justifying his conclusions. It would appear from Mr. Mandlik's *Vyavahāra Mayūkha* at pages 481, 482, and 483, from Golap Chandra Sarkar's *Hindu Law of Adoption*, particularly at pages 319, 320, 321, 323, and 329 and from Professor Jolly's *Outlines of an History of the Hindu Law*, at pages 162, 163, and 164, that Nanda Pandita in the *Dattaka Mimamsa* was influenced by thinking erroneously that the principles, upon which the practice of *Niyoga* was in remote ages governed, controlled the Hindu law of adoption, and that the application of those principles or of a misconception of those principles led Nanda Pandita to the view that the adoption amongst the three regenerate classes of a daughter's son, a sister's son, and the son of a mother's sister was positively prohibited and illegal. That Nanda Pandita mixed up *Niyoga* with adoption appears plainly from his comments on the passage to which I am now referring, which appears in an earlier part of the text of *Saunaka*. A full translation of the text of *Saunaka* on adoption is given by Mr. Mandlik at pages 52 and 53 of his *Vyavahāra Mayūkha* and by Golap Chandra Sarkar at pages 308 and 309 of his *Hindu Law of Adoption*. The particular sentence occurs in the middle of a long description of the rites and ceremonies to be followed in an adoption and after the most important of those rites and ceremonies have been described, and before the description of ceremonies in adoption, the omission of which has been held by Courts in India not to invalidate an adoption. The particular sentence as it appears in paragraph 15 of section V of the *Dattaka Mimamsa* of Nanda Pandita was translated by Mr. Sutherland (Stokes' *Hindu Law Books*, page 590) thus;—"having adorned with clothes, and so forth, the boy, bear-

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ing the reflection of a son." The translation of the particular sentence has been given by Mr. Mandlik at page 52 of his *Vyavahāra Mayūkha* as follows:—"having with clothes and the like adorned the boy bearing the reflection of a son, &c.," and by Golap Chandra Sarkar at page 308 of his *Hindu Law of Adoption* thus:—"having adorned the boy bearing the reflection of a son with clothes and the like, &c." Dr. Bühler has translated the original text thus:—"He then should adorn the child which (now) resembles a son of the receiver's body, &c." (*Journal of the Asiatic Society of Bengal*, 1866, article *Saunaka Smṛiti*). Nanda Pandita apparently construed the passage in question as descriptive of the son prior to the adoption and not as descriptive of the adopted son after all the important rites and ceremonies, including the request for the gift, the gift, and the acceptance of the gift of the son in adoption, had been performed. It is highly improbable that in the middle of a passage describing the ceremonial of adoption Saunaka should have introduced, out of its place, a sentence having the effect of prohibiting the adoption of a son of a daughter, of a sister or of a mother's sister. It appears to me that the sense of the sentence, having regard to the place where that sentence appears, is given in Dr. Bühler's translation, and that the sentence means that, all the important rites and ceremonies of adoption having been performed, the adopted son then, and for the first time bore the reflection of a son to the man who had adopted him. The comments of Nanda Pandita are to be found in the 16th and following paragraphs of section V of Mr. Sutherland's translation of the Dattaka's *Mimamsa* at pages 590 and 591 of Stokes' *Hindu Law Books*. Paragraphs 16 and 17 are as follows:—"16 ('The reflection of a son.') The resemblance of a son,—and that is, the capability to have sprung from [the adopter] himself, through an appointment (to raise issue on another's wife), and so forth; as (is the case) of the son of a brother, a near or distant kinsman, and so forth. Nor is such appointment of one unconnected impossible; for, the invitation of such (to raise issue) may take place under this text: 'For the sake of seed, let some Brahmana be invited by wealth, &c.'"

"17. Accordingly, the brother, paternal and maternal uncles, the daughter's son and that of the sister, are excluded: for they bear not resemblance to a son."

If Mr. Sutherland's translation is correct, Nanda Pandita must have been applying in paragraphs 16 and 18 of section V the principles of the *Niyoga* to Saunaka's text describing the ceremonies of an adoption in the *Dottaka* form. Except that by *Niyoga* a son was born it was in every particular the reverse of marriage. In marriage a husband obtained from his wife a son of his own getting, and he did not cease to be to his wife as a husband when she bore a son to him. In *Niyoga* apparently, to judge from texts and comments in Colebrooke's Digest, an impotent man might authorize his wife to conceive by another man who was a brother or a kinsman or a Brahman, and the son so begotten might inherit the property of his mother's husband like a son of the body of that husband begotten on his own wife; also a sonless widow might lawfully bear a son provided she had received her husband's authority in his lifetime, or was authorized by her spiritual parents; further, a man who had no male issue might, after due authority given to him, beget a son from his own body on the wife of another, and in that case the son so begotten on the wife of another was considered as the son of his mother's husband and as the son of the man who had begotten him. The brother or kinsman who was invited to raise issue in the case of the impotent husband was bound to abstain from the woman as soon as she conceived and could not lawfully beget a second son on the woman. There were several directions as to the conduct of the man who was invited to raise issue, to which it is not necessary to refer; it is sufficient to say that there was no analogy between *Niyoga* and Marriage. In the latter part of paragraph 16 of section V, it is quite certain that Nanda Pandita was referring to that particular form of *Niyoga* in which a brother or a kinsman or a Brahman was appointed or invited to beget a son for an impotent husband on that husband's wife, and, if Mr. Sutherland's interpolations (in brackets) were discarded, it is probable that the earlier part of that paragraph referred also

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to that particular form of Niyoga. In paragraphs 19 and 20 of section V, if Mr. Sutherland's translation be correct, Nanda Pandita apparently wandered off into illustrations from marriage. In paragraphs cxxxvi, cxliv and cxlv, at pages 362 and 366 of Colebrooke's Digest, Volume II, will also be found curious illustrations to explain the result of Niyoga. The paragraphs of Nanda Pandita, to which I am referring, have puzzled Sanskrit scholars. The Madras High Court in *Minakshi v. Ramanada* (1) held that Mr. Sutherland's translation of paragraph 20 of section V was incorrect; that the Sanskrit of Nanda Pandita in that paragraph which Mr. Sutherland had translated as "with the mother of whom the adopter might have carnal knowledge" were correctly translated by Mr. Mandlik thus: "with the mother with whom Niyoga is possible."

It is generally hazardous work to attempt to give an explanation of the source of many of the opinions of such a writer as Nanda Pandita. In some cases no doubt they were evolved from his inner consciousness, in others they resulted from a simple misapprehension of an ancient text, and in others they were the result of confusing two or three totally different matters, and of construing the ancient text in the light of such confusion. The following explanation of the source of Nanda Pandita's opinions as explained in paragraph 16 to 20 of section V of the Dattaka Mimansa appears to me to be reasonable. Manu mentioned twelve kinds of sons. They are thus given in Slokes 159 and 160 of Chapter IX of the Laws of Manu (Sacred Books of The East, Vol. XXV):—"159. The legitimate son of the body, the son begotten on a wife, the son adopted, the son made, the son secretly born, and the son cast off, (are) the six heirs and kinsmen. 160. The son of an unmarried damsel, the son received with the wife, the son bought, the son begotten on a remarried woman, the son self-given, and the son of a Sudra female, (are) the six (who are) not heirs (but) kinsmen." Sloke 165 is as follows:—"165. The legitimate son and the son of the wife (thus) share the father's estate; but the other ten become members of the

(1) I. L. R., 11 Mad., 49.

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family, and inherit according to their order (each later named on failure of those named earlier)." In Slokes 166 to 179 the twelve kinds of sons are more fully described. The 166, 167, and 168 Slokes are translated by Dr. Bühler (*Sacred Books of The East*, Vol. XXV), thus:—"166. Him whom a man begets on his own wedded wife, let him know to be a legitimate son of the body (Aurasa) the first in rank. 167. He who was begotten according to the peculiar law (of the Niyoga) on the appointed wife of a dead man, of a eunuch, or of one diseased is called a son begotten on a wife (Kshetrāja). 168. That (boy) equal (by caste) whom his mother or his father affectionately give, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)." Then follow the descriptions of the Kritrima and the others of the secondary sons or substitutes for sons, all except the legitimate son being referred to in Sloke 180 as "substitutes for a son, (taken) in order (to prevent) a failure of the (funeral) ceremonies." In Chapter X of that part of Devanda Bhatta's *Smṛiti Chandrika* which relates to the Law of Succession and Inheritance he refers to Manu's list of twelve sons. After referring to the legitimate son (Aurasa) Devanda Bhatta says (Chapter X of the translation by Krishnasawmy Iyer of the *Smṛiti Chandrika* of Devanda Bhatta on the Law of Inheritance):—"The sons of the description of Kshetrāja and the like inherit the property of their respective fathers [namely, the husband of the woman on whom the Kshetrāja was procreated and the like,] and not the brothers, &c., of such fathers. 4. The same author [Manu] defines Kshetrāja and the other classes of secondary sons:— I. He who was begotten, according to law, on the wife of a man deceased, impotent, or degraded, after due authority given to her, is called 'Kshetrāja' or the lawful son of the wife. II. He whom his father or mother affectionately gives as a son, being alike [by a class] and in a time of distress; confirming the gift with water, is called 'Datrima' or a son given." Then follow the definitions of the other kinds of sons. Amongst the twelve sons mentioned by Manu and referred to by Devanda Bhatta, there is no mention of, or allusion to, a son begotten by

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a sonless man upon the wife of another man; and, indeed, it would further appear from those Slokes of Chapter IX of the Laws of Manu (Sacred Books of The East, Vol. XXV), beginning with Sloke 31, concerning male offspring that the form of Niyoga by which in ancient times a sonless man might with the authority of the husband beget a son on another man's wife was not allowed by Manu. In Slokes 41—42 Manu says:—

“41. Never, therefore, must a prudent well-trained man, who knows the Veda and its Angas and desires long life, cohabit with another's wife. 42. With respect to this matter those acquainted with the past recite some stanzas, sung by Vayu (the Wind, to show): that seed must not be sown by (any) man on that which belongs to another.” Then follow several illustrations from the growing of crops, &c. This is the illustration given in Sloke 53:—“53. But if by special contract (a field) is made over (to another) for sowing, then the owner of the seed and the owner of the soil are both considered in this world as sharers of the crop.” One who did not read Sloke 53 with the Slokes preceding it and with those succeeding it might possibly infer that in Sloke 53 Manu recognised that form of Niyoga by which a sonless man beget a son upon another man's wife; even if such inference might properly be drawn from Sloke 53, yet the son so begotten would not be one of the twelve sons mentioned by Manu, who could inherit and also perform the funeral ceremonies. According to section X of Chapter II of Mr. Colebrooke's translation of the Mitakshara, which treats of the rights of the dwyamushyayana or son of two fathers, Niyoga to have effect in producing a son who could offer funeral oblations must have been performed on the wife of a childless man, and Manu had apparently prohibited the practice, and also, apparently, it was permissible only when the woman had been betrothed, but the marriage had not been consummated, and the man to whom she had been betrothed had died childless. According to Manu and Devanda Bhatta the Kshetrāja was the only son begotten in Niyoga who could inherit and perform the funeral ceremonies. The Kshetrāja was begotten in Niyoga pure and simple, and was not treated by Manu or Devanda Bhatta as in any sense a son

adopted (datrima) in the dattaka form, to which form alone the text of Saunaka related. Some commentators have referred to the secondary or substitute sons mentioned by Manu as adopted sons; but it is clear that the only son who could be said to have been adopted in the dattaka form was the datrima mentioned in the 168th sloke of Chapter X of the Laws of Manu. We have seen that the latter part of paragraph 16 of Section V of Nanda Pandita's Dattaka Mimansa refers to that form of Niyoga in which alone the Kshetraja could be begotten, and that reading that portion of the paragraph with the earlier part, as Nanda Pandita apparently intended it to be read, and omitting Mr. Sutherland's interpolations, the whole paragraph related to that one form of Niyoga by which the Kshetraja could be begotten, that is by another man upon the impotent husband's wife. Paragraph 18 of section V of the Dattaka Mimansa of Nanda Pandita obviously referred to Niyoga; but owing to the doubts which have been entertained as to Mr. Sutherland's translation being correct, I am unable to say to which form of Niyoga Nanda Pandita was referring in that paragraph. Now my explanation is that Nanda Pandita looking about for any explanation, except the obvious one, of the text of Saunaka relating to the resemblance of a son, and finding the datrima following immediately after the Kshetraja in the list of sons who could inherit given in Devanda Bhatta's Smriti Chandrika and in the laws of Manu, confusedly considered that there was some connection between the datrima and the Kshetraja, or in other words between adoption in the dattaka form and Niyoga, and with a little wandering off into fanciful illustrations from marriage, the result was paragraphs 16, 17, 18, 19 and 20 of section V of the Dattaka Mimansa. What Nanda Pandita overlooked was that if adoption in the dattaka form was controlled by the principles of the only form of Niyoga, in which according to Manu and Devanda Bhatta a son could be born who could inherit and perform the funeral ceremonies, there never could be born a boy who could be an object of adoption in the dattaka form; for the son begotten by another man on the wife of the impotent husband with his authority was in the Hindu Law of those ancient times the son of the latter, and

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a man cannot adopt his son. If, as the Madras High Court held, Mr. Mandlik's translation of the concluding words of paragraph 20 of section V of Nanda Pandita's Dattaka Mimansa be correct, and Mr. Sutherland's translation of those words be incorrect, it is plain that Nanda Pandita when he wrote them was referring to Niyoga and not to marriage. Nanda Pandita was no more justified in confusing the Datrima (adopted son) with the Kshetrāja than he would have been if he had confounded the Datrima with other secondary sons, and had illustrated the text of Saunaka by references to them. Dr. Jolly, at pages 163 and 164 of his *Outlines of an History of the Hindu Law*, and Mr. Mandlik, at pages 482 and 483 of his *Vyavāhāra Mayūkha*, give forcible illustrations of the result of applying the principles of Niyoga to adoption, and show that if Nanda Pandita was correct in applying the principles of Niyoga to adoption other rules propounded by him in his Dattaka Mimansa must be wrong.

The opinion, that in adoption amongst the three regenerate classes the person to be adopted must be one who by a legal marriage with his mother might have been the legitimate son of the adopter which influenced Sir William Macnaghten and others who wrote on the subject of adoption, and which led to many of the decisions of the Courts in India as to a daughter's son, a sister's son, and the son of a mother's sister being inadmissible for adoption amongst the three regenerate classes, appears to me to have been adopted from a passage in Mr. Sutherland's Synopsis which accompanied his translation of the Dattaka Mimansa and the Dattaka Chandrika. The passage in the Synopsis is to be found at page 664 of Stokes's *Hindu Law Books*, and is as follows:—"The first and fundamental principle is that the person proposed to be adopted, be one who by a legal marriage with his mother might have been the legitimate son of the adopter. By the operation of this rule, a sister's son and offspring of other female, whom the adopter could not have espoused, and one of a different class are excluded from adoption. In the present age, marriage with one unequal in class is prohibited." Whether or not that statement in the Synop-

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sis was a reasonable deduction from the comments of Nanda Pandita in paragraphs 16 to 20 of section V of his *Dattaka Mimansa*, I think it is obvious that it was upon the supposed authority of those comments that Mr. Sutherland made the statement. If the comments of Nanda Pandita in paragraphs 16 to 20 of section V of his *Dattaka Mimansa* were not justified by the text relating to the resemblance of a son, it follows that the statement of Mr. Sutherland, which I have quoted from his Synopsis, was without foundation in the Hindu law, as in my opinion that statement was.

Professor Jolly at page 163 of his *Outlines of an History of the Hindu Law* referring to what he describes as "a somewhat obscure passage in Nanda Pandita's *Dattaka Mimansa*" says:—"Supposing even the reading translated by Sutherland to be correct, which is doubtful, it was apparently not connection by marriage, but connection by *Niyoga*, which Nanda Pandita had primarily in view." Mr. Mandlik at pages 480 and 481 of his *Vyaváhara Mayú-kha* referring to Mr. Sutherland's rule in his Synopsis says:—"Mr. Sutherland's rule in his Synopsis goes far beyond what he cites as his authorities. He seems to have confounded *Niyoga* with what he calls 'legal marriage' *Niyoga* is not a marriage at all of any kind whatever, and further, *Niyoga* presupposes at the least a former betrothal of the woman with whom the said *Niyoga* is presupposed. *Niyoga*, strictly speaking, means the raising up of issue on the widow of a deceased by some one on appointment. As a practice, it has been reprobated by Manu. At no time in India's History was *Niyoga* ever exalted to the rank of marriage; and it is now a mere fossilized relic of the past. Marriage is one of the principal *Sanskaras* amongst the Hindus; whereas *Niyoga* is neither a *Sanskara* nor even a mere inferior popular observance sanctioned by custom. At the best, it was according to Manu a beastly practice, reprobated by the learned, and expressly prohibited in the Kali age. How Mr. Sutherland should have made the mistake of confusing *Niyoga* with 'legal' marriage is to me inexplicable."

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Shortly expressed the conclusions at which I have arrived with regard to Nanda Pandita's views on this question of adoption are that the texts from Saunaka, even as given by Nanda Pandita, do not bear the construction which he has put upon them, and that there is too much uncertainty as to the genuineness, completeness, and authority of the text cited by him as a text from Sākalya to warrant his conclusion that the adoption of a son of a sister, the son of a daughter and the son of a mother's sister amongst the three regenerate classes was prohibited by the Hindu text law as it existed at or prior to the time when he wrote his *Dattaka Mimansa*. That no such prohibition existed in the law as understood at that time by the School of Benares I am satisfied.

The next question is, have the opinions of Nanda Pandita as to the adoption of a son of a sister, of a son of a daughter, or of the son of a mother's sister amongst the three regenerate classes been within the last 270 years generally accepted and acted upon by Hindus who are subject to the Benares School of Hindu Law; in other words is there any proof, clear or otherwise, upon which a Judge would be justified in acting, that any general usage based upon or in conformity with that opinion of Nanda Pandita has sprung up amongst and been followed by Hindus subject to the Benares School of Hindu law? What may or may not have taken place amongst Hindus subject to other schools of Hindu law may be instructive to students of, and writers on, Hindu law, but the existence or non-existence in other schools of Hindu law of a usage cannot be accepted in proof or in disproof of the existence of the same usage in the Benares School of Hindu law, with which alone we are concerned. We know from what I have already stated that in Madras, probably in Bombay and possibly in Lower Bengal, the prohibition against such adoptions has not been universally accepted, and we know that no such restriction of the right of adoption, based on the ground of incest, has been accepted in the Panjáb. From that we cannot infer that there is amongst Hindus in these provinces, who are subject to the Benares School, any usage or sacred text which prohibits the adop-

tion of a sister's son, of a daughter's son, or of the son of a mother's sister.

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Can we draw an inference that any such usage existed generally or at all in these provinces or elsewhere from the writings of Mr. Sutherland, of Sir Francis Macnaghten, of Sir William Macnaghten, or of Sir Thomas Strange? Mr. Strange's Manual of Hindu Law is not in this Court's Library, and consequently I am unable to express any opinion as to his views.

We know upon what basis or rather lack of basis Mr. Sutherland founded his opinion that;—"The first and fundamental principle (of the Hindu Law of Adoption) is that the person proposed to be adopted, be one who by a legal marriage with his mother might have been the legitimate son of the adopter." We know that Mr. Sutherland's opinion was founded upon the Dattaka Mimansa of Nanda Pandita and upon Mr. Sutherland's confusion of marriage with Niyoga.

The statement in Macnaghten's Principles and Precedents of Hindu Law (Sir William Macnaghten's) at page 87 of Volume I of the 3rd edition that the party adopted should not be the son of one whom the adopter could not have married, such as a sister's son or a daughter's son is obviously a mere paraphrase of the passage in Mr. Sutherland's Synopsis which I have already quoted, although Narada is apparently the only authority cited by Sir William Macnaghten for that particular proposition. We know from Professor Jolly, who translated the Narada Smriti, that no such rule is to be found in either of the two versions of the Narada Smriti. In the note at page 185 of Volume II of the 3rd edition of Macnaghten's Principles and Precedents of Hindu Law to case XII in which the Pandits in a case from zilla Mirzapur had stated in effect that the adoption of a daughter's son was valid, it is suggested that the parties were Sudras. I have already pointed out that if the parties were Sudras the question so far as the legality of the adoption of a daughter's son was concerned was unnecessary and meaningless, as no one had ever suggested that such an adoption by a Sudra would not be valid. So far as I have been

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able to ascertain there was, with the exception of the case to which I have last referred, no report until long after the publication of Macnaghten's Principles and Precedents of Hindu Law of any case, in which the question of the right of a member of one of the three regenerate classes to adopt a sister's son, or a daughter's son, or a son of a mother's sister arose, which clearly came from any district in which the Hindus were subject to the Benares School of Hindu law. If I am in error in assuming that in case XII to which I have just referred, the parties were not Sudras, (Sir William Macnaghten considers that the parties were Sudras,) then so far as I have been able to ascertain there was not, until more than thirty years after Macnaghten's Principles and Precedents of Hindu Law were written and until many years after the death of Sir William Macnaghten, any report of any decided case in which this question arose and was decided, and in which it is clear that the parties were members of one of the three regenerate classes and were Hindus subject to the School of Benares, or were even residents within the district in which the law of that School prevails. Consequently, notwithstanding the reputation of the Principles and Precedents of Hindu Law, I cannot infer from it that at or before the time it was written there was any usage amongst the Hindus subject to the Benares School by which the adoption of a sister's son, or a daughter's son, or of the son of a mother's sister was prohibited amongst any classes of Hindus. The same remarks would apply to the works of Sir Francis Macnaghten and Sir Thomas Strange, who wrote respectively in 1824 and 1825.

The statement at page 150 of Sir Francis Macnaghten's Considerations on the Hindu Law as it is Current in Bengal, published in 1824, that;—"The son of a sister, or of a daughter may be adopted by a Sudra. As to three superior classes, the rule is, that they cannot adopt a son whom it would be incest to have begotten," is evidently taken from the comments of Nanda Pandita in the Dattaka Mimansa and from the statement of Mr. Sutherland in his Synopsis to which I have already referred. Later in page 150 Sir Francis Macnaghten said:—"The Reverend Saunaka Muni,

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(as he is called by *Goverdhana*) says But in no case a *sister's son*, or a *daughter's son*, or those whom commonsense prohibits the adoption of, such as a *brother*, a *paternal uncle*, or a *maternal uncle* . . ." The italics are Sir Francis Macnaghten's.

Sir Thomas Strange at page 83 of his *Hindu Law*, Volume I, treating of the relation of the person to be adopted to the adopter, says: "The general principle, as laid down in a recent work of great weight upon the whole of this subject, is, *that one, with whose mother the adopter could not legally have married, must not be adopted*; * * * Though the adopted be not the actual son of the adopter, he is to resemble, and come as near to him as possible. He is to be at the least such as that he might have been his son. But the adopter could not have married his own mother; it is a prohibited connexion. Consequently his brother cannot be adopted by him. The same consideration excludes the paternal and maternal uncles; the daughter's and the sister's son. It must be noticed, however, that these two latter are eligible to adoption among Sudras: if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable." We know from note (3) at page 83 that the "recent work of great authority" was Mr. Sutherland's *Synopsis*. We also know from the notes to pages 83 and 84 that the *Dattaka Mimansa* and the *Dattaka Chandrika* were the other authorities upon which Sir Thomas Strange relied in part for the propositions which I have quoted. It is obvious from the concluding portion of the quotation that Sir Thomas Strange did not accept as universally applicable the rule of Mr. Sutherland's *Synopsis* or the rule of the *Dattaka Mimansa* of Nanda Pandita. If the incest theory of Nanda Pandita and Mr. Sutherland were the true theory, and if Nanda Pandita's construction of the text of Saunaka were correct, it is difficult to understand how the difficulty as to incest could be removed where no other than a daughter's son or a sister's son happened to be procurable for adoption. I have already referred to the note at page 101 of the 2nd volume of Sir

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Thomas Strange's Hindu Law. The whole note is valuable, as it apparently was written after considerable research and with knowledge of the Dattaka Mimansa of Nanda Pandita and before the mind of Sir Thomas Strange, if he was the writer, had been influenced by the sweeping proposition of Mr. Sutherland in his Synopsis.

Mr. Arthur Steele, who wrote in 1826, as I infer from the date of his Preface, at page 44, paragraph XXXVIII, edition of 1868, of his Law and Custom of Hindoo Castes within the Dekhun Provinces Subject to the Presidency of Bombay, after giving a list of five classes of boys who may be adopted, says:—"6. A boy of a different Gotr, but of the same caste (Purgotr). Such are the sister's son and daughter's son, who are adoptible in default of the preceding, P. C. (Koustoobh and Nirunesindhoo). A paternal uncle cannot be adopted being in place of his father. Nor a maternal uncle for 'an elder relation' (without regard to the relative age of the parties) 'cannot be adopted.'" It may be inferred from the passage which I have quoted that the incest theory was not responsible for the exclusion of a paternal uncle and a maternal uncle from the list of those capable of being taken in adoption. It will also be noticed that Mr. Steele and Sir Thomas Strange agree that in default of other objects of adoption a sister's son and a daughter's son may be taken in adoption. That statement of Mr. Steele was founded on the authority of the opinion of the Poona College, although it appears from a note that some of the Poona Sastris held a different opinion.

An examination of the English Commentaries on Hindu law which were written between 1819 and 1830, in my opinion shows that Mr. Sutherland was responsible for the theory that the person to be adopted must be one who, by a legal marriage with his mother, might have been the legitimate son of the adopter; that that proposition was without sufficient enquiry adopted by Sir Francis Macnaghten and by Sir William Macnaghten, and that, with an important modification, which was destructive of the basis of the theory, it was adopted by Sir Thomas Strange, although Sir Thomas

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Strange was well aware that in Southern India "in practice, the adoption of a sister's son by persons of all castes was not uncommon." The text-books of authors who have followed Mr. Sutherland and Sir William Macnaghten do not, with the knowledge of the authority which was relied upon by those authors, lead me to the inference that prior to 1830 there was any generally recognised prohibition, in the texts of the Hindu law or by general usage, amongst Hindus of any of the three regenerate classes against the adoption of a sister's son, of a daughter's son, or of a mother's sister's son; on the contrary, they lead me to the conclusion that the only prohibitions against such adoptions then known were the prohibitions of Mr. Sutherland, of Nanda Pandita, and of the author of the Dattaka Chandrika.

There had not, so far as I have been able to ascertain, been any case decided prior to 1815 in which it was held anywhere that the adoption of a sister's son, of a daughter's son, or of a son of a mother's sister was prohibited amongst any one of the three regenerate classes, except possibly the case of 1809 from Masulipatam, which I have not seen. In the case No. 59 in Morley's Digest it was held in 1815 that a Brahman could not adopt his sister's son. On the other hand, we have the fact that the Dattaka Mimamsa of Nanda Pandita, the Dattaka Chandrika, the text of Saunaka, and the text given as a text from Sākalya relied upon in those commentaries are not even referred to in Mr. Colebrooke's Digest. We have also the note, but when made does not appear, of Sir Thomas Strange to the case of 1806 from the zilla of Cuddapah in which, having noticed the Dattaka Mimamsa of Nanda Pandita and two local works, he stated that in practice the adoption of a sister's son amongst all classes in Southern India was not uncommon. We have also the fact that in the case of 1808 from the zilla Mirzapur (case XII at page 185 of Macnaghten's Hindu Law, Volume II) and in the case of 1810 numbered 58 in Morley's Digest, the prohibition of Nanda Pandita was not applied. We have also the positive assurance of the late Mr. Mandlik (Introduction to the Vyavahāra Mayūkha, page 73) that in the Bombay Presidency the Dattaka Mimamsa of

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Nanda Pandita "was not even known to the people in original for many years after the publication of its translation under the auspices of Government." The abovementioned facts lead me irresistibly to the conclusion that the surmise of Mr. Mayne, in paragraph 30 of his Hindu Law and Usage, that the authority which the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika possess over other works on the subject of adoption is attributable to the fact that they became easily accessible to English lawyers and Judges from being translated by Mr. Sutherland, is well founded and is correct. Mr. Sutherland's translation of those two works was published in 1821. He had, as would appear from his Preface, been at work on the translation for some considerable time. I have come to the conclusion that the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were not treated even by the learned in Lower Bengal as works of any authority until after 1810 at the earliest. When they or their prohibitions became known, if at all, to the people it is impossible to say; most probably not even in any part of Lower Bengal until after 1815. It is easy to understand how Sir William Macnaghten may in 1829 have been misled as to their importance. To English Judges and to English Counsel a translation into English of a commentary on the law of adoption would be more intelligible than would be texts and commentaries in Sanskrit, and amongst English Judges and English Counsel in India the translations of Mr. Sutherland would at once attract attention, and would give to the Dattaka Mimansa of Nanda Pandita and to the Dattaka Chandrika an importance in the eyes of English Judges which I believe they did not possess amongst the people.

That the prohibition of Nanda Pandita and of Mr. Sutherland may have been adopted by the English Judges in Bengal between 1815 and 1824 is probable.

That the prohibition of Mr. Sutherland and the opinions of the English Judges of Lower Bengal may, in the course of years as they became known, have influenced the Brahminical order in Calcutta and the adjacent districts is not improbable, but it must be remembered that those were not the days of railways and of a widely cir-

culating native press. Whether or not a usage sprang up in Lower Bengal, prohibiting the adoption of a sister's son, of a daughter's son, and of the son of a mother's sister, is not the question which we have to decide. Except for the purposes of testing the accuracy of the statements of Sir William Macnaghten as to the authority of the Dattaka Mimansa of Nanda Pandita, and of testing the accuracy of the statements of Mr. Sutherland and of those who followed him, the enquiry as to whether or not the usage amongst the followers of the Daya Bhaga in Lower Bengal was in or prior to 1830 in accordance with that prohibition is beside the question. I think I may reasonably assume that no Hindu lawyer of position would now-a-days suggest that the existence or non-existence of a particular usage as to adoption amongst the Hindus who belong to the school of the Daya Bhaga would be evidence that the particular usage existed or did not exist amongst the Hindus who are subject to the School of Benares.

I may, however, point out that there is before this Bench absolutely nothing which a Judge could for one moment look at as evidence of the existence or non-existence at the present day of any usage amongst Hindus of Lower Bengal allowing or prohibiting the adoption amongst the three regenerate classes of a daughter's son, of a sister's son, or of the son of a mother's sister. The statement of Golap Chandra Sarkar in his Hindu Law of Adoption that such adoptions are not uncommon in Lower Bengal does not show that such a usage does exist or does not exist; that statement if well founded merely shows that the prohibition of Nanda Pandita has not been universally accepted and acted upon in Lower Bengal. As that statement was publicly made in the course of delivering his Tagore Law Lectures, and has, so far as I am aware, never been publicly contradicted, it may be taken for what it is worth. But before accepting as evidence in a suit the statement in the book of a living author that a custom or usage does or does not exist generally or in any particular locality, I should, as a Judge who is bound to administer the law, require that the author of the statement should be placed in the witness-box before me in

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order that the litigant whom that statement might affect should have an opportunity of testing its accuracy and of ascertaining the sources of knowledge upon which it was founded. Even a Judge upon the Bench cannot lawfully act upon his own knowledge of a particular fact, but must act upon the evidence before him, as was pointed out many years ago by Mr. Field, who was a distinguished Judge of the High Court at Calcutta, in his Introduction to his Law of Evidence in British India.

To the question whether any such prohibition was in or prior to 1830 understood and adopted by the Hindus of these provinces who are subject to the School of Benares, the only answer which, in my opinion, a Judge can give is that there is, so far, no evidence that it was, and as no text of the Hindu law of the School of Benares imposes such a prohibition, or limits in that respect the right of adoption, the presumption is that no such prohibition had been imposed by any usage amongst the Hindus of that School.

I shall now refer to those of the reported cases which related to Hindus resident within the districts, which have always been subject to the Hindu law of the Benares School, in order to ascertain, if possible, whether or not they afford any evidence as to the existence, either before or after 1830, amongst the three regenerate classes of Hindus who are subject to the School of Benares of any usage by which a sister's son or a daughter's son or the son of a mother's sister could not be validly adopted. The earliest case of which I have been able to discover any trace is case XII in Macnaghten's Principles and Precedents of Hindu Law, Volume II, pages 185, 186, and 187; it was as I have already said a case from zilla Mirzapur in 1808. Assuming that the reason which I have already given for concluding that the parties belonged to one of the three regenerate classes is correct, it shows that in 1808 in the Benares School the opinion of the Pandits was that an adoption of a daughter's son was valid and that Nanda Pandita's doctrine as to incest was not entertained in the Benares School.

In 1810 a suit was instituted in the Provincial Court of Bareilly, which ultimately came on appeal in 1834 before their Lordships of the

Privy Council from the Sudder Dewáni Adálat of Bengal. It was the case of *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (1). It involved the questions as to whether a widow who had not been given authority by her husband to adopt and had not the authority of her deceased husband's relatives to adopt could adopt a son to him, and whether an only son could be given in adoption. Its only interest in the present case consists in the statements made by certain Pandits who were consulted in the course of the suit. On the 12th of April 1813 the Provincial Court dismissed the suit. The plaintiff appealed to the Sudder Dewáni Adálat at Calcutta, which Court, after having taken the opinion of certain Pandits, dismissed the appeal on the 14th of July 1817. These dates are material, as they indicate the period within which the Pandits who were consulted by the Sudder Dewáni Adálat gave their opinion. The Pandits who were consulted by the Sudder Dewáni Adálat were the Pandit of the Provincial Court of Bareilly and certain Pandits in Calcutta of the Sudder Dewáni Adálat. The Pandit of the Provincial Court of Bareilly in his reply made the monstrously untrue statement that the Vyavahára Mayúkha was in force in the zilla Etáwah. The Vyavahára Mayúkha has never been in force in any of the districts of the North-Western Provinces of the Presidency of Fort William in Bengal. It would of course be applicable to Hindus who had come from the Bombay Presidency and had carried with them and retained their laws. It is obvious that the parties to the suit were natives of these provinces, and were not Mahrathas. The Pandits of the Sudder Dewáni Adálat at Calcutta in their reply stated that the Dattaka Mimansa was in force in the zilla Etáwah. The probability is that the latter statement had no more foundation in fact than had the statement as to the Vyavahára Mayúkha. The Pandits in Calcutta in making this statement as to the Dattaka Mimansa were most probably influenced by the fact that the prohibition of the Dattaka Mimansa of Nanda Pandita must have been applied in 1815 in case No. 59 of Morley's Digest, although it does not appear to what part of the country the parties in that case belonged.

(1) 2 Knapp, 203.

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How the Pandits of Calcutta should have known what were the works of authority received by the Hindus of the Etawah district does not appear. The Etawah district is nearly 800 miles distant from Calcutta, and, in those days of bullock-garis, it must have taken from four to five weeks to make the journey from Calcutta to Etawah. Further, the Hindus of Lower Bengal and the Hindus of these provinces were as little of the same race as Italians and Germans are, and the languages spoken by the people of the respective districts were essentially different. The Pandit of Etawah who was consulted by the Provincial Court, and the Pandit of Benares, the latter of whom had given an opinion in another case, the record of which had been forwarded to the Sudder Dewani Adalat, had apparently not referred either to the Dattaka Mimansa of Nanda Pandita or to the Vyavahara Mayukha.

The next case was that of *Luchmeenauth Rao Naik Kaleya v. Mussumat Bhina Bae* (1). That case came from Benares and raised amongst other questions the question whether the adoption of a sister's son during the lifetime of a brother's son was illegal. The Court Pandits advised that the adoption of a sister's son during the lifetime of a brother's son was illegal. It is specially to be noticed that neither the plaintiff's case nor the answer of the Court Pandits suggests that the adoption of a sister's son would, if the brother's son had not been alive at the date of the adoption, have been prohibited and illegal. We know that for years there was a fierce controversy on the question whether anyone other than a brother's son could be adopted, if a brother's son was alive and eligible. The Principal Sudder Amin and the Sudder Dewani Adalat of these Provinces on appeal declined to decide the question of adoption and decided the case on another point. In page 1028 of West and Bühler's Digest of the Hindu Law, 3rd edition, that case is cited as an authority for the proposition that in the North-Western Provinces, "the adoption of a sister's son is invalid, according to the decisions, as it imports incest not only among Brahmans, but generally in the three regenerate classes, except perhaps the

(1) 7 S.D.A., N.-W. P., 441.

Vaisyas." The fact is that the case decided nothing of the kind, the only inference to be drawn from it is that in the School of Benares in 1852 the prohibition of Nanda Pandita and Mr. Sutherland and their doctrine of incest had not been accepted. The authors of West and Bühler's valuable Digest of Hindu Law were possibly misled by Sir Michael Westropp, C.J., as to what had been decided in these provinces in *Luchmeenauth Rao Naik Kaleya, v. Mussumat Bhina Bae*. Sir Michael Westropp cited that case in his judgment in *Gopal Narhar Sifray v. Hanmant Ganesh Safray* (1) for the following proposition:—"The adoption of a sister's son by a Brahman has in the North-Western Provinces also been held invalid."

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In January 1866 the case of *Shib Lall and Shitab Rae v. Bishumber*, (2), was decided in appeal by the Sudder Dewáni Adálat of these Provinces. The suit was for cancellation of a deed of gift on the ground that the gift was contrary to the administration papers of the village in which the subject of the gift was. The defendants pleaded that the administration papers did not invalidate the gift, that the village had been divided and the administration papers had ceased to be of force, and further that the gift having been made to an adopted son was good in law. The parties were Brahmans. The adoption was of a sister's son. The donor stated that he had taken the child, Deena Nath, into his house when the child was five years old, had adopted the child two years later, had feasted the members of the brotherhood in acknowledgment of the adoption and had managed and defrayed the expenses of the marriage of Deena Nath who had continued until his death as a member of the donor's family. The Munsif dismissed the suit finding the issues, including that as to the adoption, in favour of the defendants. The District Judge in appeal, without expressing any opinion as to the validity of the adoption, reversed the decree of the Munsif and gave the plaintiff a decree cancelling the gift on the ground that as the division of the village had not been completed the gift was contrary to the administration papers. The

(1) I.L.R., 3 Bom. at p. 202.

(2) S.D.A., N.-W.-P., 1866, p. 25.

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defendants appealed to the Sudder Dewáni Adálat of these Provinces, and that Court agreed with the District Judge as to the gift having been invalid by reason of the administration papers, and accepting, for the purposes of its judgment, the statement of the donor as to the adoption of Deena Nath applied the prohibition of Mr. Sutherland in the very words of its author in the Synopsis, using inverted commas and giving the reference, and found that the adoption was illegal. It is obvious that the Sudder Dewáni Adálat of these provinces did not find against the adoption on any evidence of a usage. The evidence as accepted by that Court for the purposes of its judgment strongly negatived any usage forbidding such an adoption, it showed that on the occasion of the adoption the members of the brotherhood had assembled and had been feasted in acknowledgment of the adoption. If in the opinion of the members of the caste the adoption of a sister's son was illegal according to Hindu Law, the members of the brotherhood would not have attended the adoption feast, and thereby rendered themselves liable to be outcasted. It will be remembered that the Native Munsif had found the adoption valid. Without any evidence that Mr. Sutherland's prohibition against the adoption of a sister's son had been accepted by usage in these provinces, and with evidence before them strongly indicating that the adoption by a Brahman subject to the School of Benares of his sister's son was not contrary to usage in these Provinces, the two learned Judges of the Sudder Dewáni Adálat applied Mr. Sutherland's prohibition. It was not until 1868 that their Lordships of the Privy Council in *The Collector of Madura v. Moottoo Ramalinga Sathupathy* (1) laid down what were the duties of an English Judge in such cases.

The next case in these provinces was that of *Musummat Baitas Kuar v. Lachman Singh* (2). In that case a widow without authority from her deceased husband had adopted to her deceased husband her brother's son. The first Court held on the authority of the Dattaka Mimansa of Nanda Pandita that a brother's son must not be

(1) 12 Moo. I. A. at p. 436.

(2) 7 N-W. P., H. C. Rep., 117.

adopted by a sister. The Judge of Cawnpore decided in appeal against the adoption on the ground that according to the Dattaka Mimansa as referred to in Macnaghten's Hindu Law, the party adopted should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This Court without considering whether any such rule of law was deducible from the texts of the law or was accepted by the School of Benares held that the adoption was "liable to be avoided on the ground that the adopted person was not legally eligible for adoption by the widow on her husband's behalf, and also on the ground that she had not been authorized by him to adopt a son on his behalf." In that case Mr. Justice Pearson and Mr. Justice Spankie apparently without any consideration of the subject and certainly without any proof of a usage in these provinces adopted the dicta of Nanda Pandita and Sir William Macnaghten, as they found them. That case was decided by this Court in 1875. As an authority on the particular question before us that decision is worthless, if in fact, as it would appear, the widow had adopted her own brother's son to her husband. The prohibition of Nanda Pandita and of Mr. Sutherland does not apply to the adoption of the son of a wife's sister or of the son of a wife's brother, and consequently even according to Nanda Pandita and Mr. Sutherland the adopted person was not in fact legally ineligible for adoption by the widow on her husband's behalf. That adoption would have been good if the widow had received authority from her husband to adopt to him. An adoption of a son by a widow to her husband with his authority, and an adoption of a son to herself are, as every student of the Hindu law knows, two totally different questions, and are not to be confounded; in adopting a son to her husband with his authority, the wife or widow, as the case may be, acts as her husband's agent. The authorities which show that a wife's brother or his son, or the son of a wife's sister may be adopted are given in the notes to paragraph 118 of Mr. Mayne's Hindu Law and Usage.

The next case, in which the legality of the adoption of a sister's son by a member of one of the three regenerate classes was questioned which came before this Court was that of *Parbati v.*

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Sundar (1). That case was before this Court in 1885, and the two learned Judges before whom it came considering themselves bound by authority declined to consider the question of the legality of the adoption. The fact was that question was in that case irrelevant. So far as I am aware, there had been no decision of this Court or of the Sudder Dewáni Adálat of these provinces which in any way precluded them from considering the question as to the legality of the adoption. There was no case, so far as I have been able to ascertain, in which any usage amongst Hindus subject to the School of Benares prohibiting such an adoption had been found, or had been even attempted to be proved. If the attention of those learned Judges had been drawn to the passage which I have quoted from the judgment of their Lordships of the Privy Council, in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2), and if they had considered the question to be relevant, they would doubtless have attempted to ascertain whether the prohibition of Nanda Pandita and Mr. Sutherland had been received by the Benares School of Hindu Law which governed the district with which they had to deal, and whether that prohibition had in that district been sanctioned by usage. That decision in I. L. R., 8 All., 1, has been cited as an authority that the rule of Mr. Sutherland, as limited to the three regenerate classes, had been affirmed by this Court. In my opinion, as an authority for the proposition that any such rule either in 1885 or at any time was of force in these provinces, it is useless. That case went on appeal to Her Majesty in Council. Their Lordships, L. R. 16 I. A., 186, reversed the decree of this Court on another point, and as to the question of adoption merely said:—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son." I do not think that their Lordships would hold that that observation precludes this Court from considering the matter.

The next case in this Court on the subject of the adoption of a sister's son by a Brahman was that of *Chain Sukh Ram v. Parbati*

(1) I. L. R., 8 All., 1.

(2) 12 Moo. I. A., at p. 436.

(1). In that case two appeals were heard together. In one of those appeals Musammat Parbati, who was the appellant in the case reported in I. L. R., 8 All., 1, was a respondent, and in the other of those cases Musammat Sundar, who was the respondent in the case in I. L. R., 8 All., 1, was a respondent. The original suits in which those two appeals arose had been tried in the court of first instance after the Judges of this Court had in *Parbati v. Sundar* (2) declined to consider the question of the legality of the adoption of a sister's son considering themselves bound by authority to hold that such an adoption was invalid. Consequently in the two later suits evidence was called from Muzaffarnagar, Meerut, Bulandshahr, Aligarh, Delhi, Saharanpur, Muttra, Etawah and Cawnpore, to prove that there was a custom amongst Bohra Brahmans by which the adoption of a sister's son was valid. When those suits came in appeal before this Court, it was strongly contended that the question as to whether such a custom could be valid was concluded adversely to the custom by their Lordships of the Privy Council in *Sundar v. Parbati* (3) in the passage which I have already quoted. Mr. Justice Tyrrell and I held that we were not precluded from considering the question of custom, and after pointing out that the alleged rule of Hindu law which prohibits amongst the regenerate classes the adoption of a sister's son, or a daughter's son, had in many parts of India been varied by custom or had possibly never been followed, and that grave doubts had been raised as to the authenticity of the principle that the person to be adopted must be one who by a legal marriage with his mother might have been the legitimate son of the adopter, assumed for the purposes of the appeal before us, but did not decide, that Mr. Sutherland's view on the subject was correct, and proceeded to try the issue as to the alleged custom amongst Bohra Brahmans in these provinces. We found as a fact on the evidence that the custom amongst Bohra Brahmans of these provinces to adopt a sister's son was proved, and we held that the custom was valid and good in law. That Bohra Brahmans belong to one of the many divisions of Brahmans and

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(1) I. L. R., 14 All., 53. (2) I. L. R., 8 All., 1.

(3) L. R., 16 L. A., 196.

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consequently belong to one of the three regenerate classes of Hindus cannot be doubted. That case proves that when put to the test of evidence as to the usage of at least one important branch of the Hindu community in the northern parts of these provinces the prohibitions of Nanda Pandita and of Mr. Sutherland have been entirely disregarded as binding by that branch of Brahmans; it proves no more, but it suggests that it would be judicially rash to hold, except upon clear evidence, that the prohibitions of Nanda Pandita and Mr. Sutherland have been accepted as binding by any of the three regenerate classes of Hindus of these provinces.

There are three cases bearing on this question of adoption mentioned at pages 18 and 19 of Morley's Digest. They are cases numbered 58, 59, and 60, and were respectively decided in 1810, 1815, and 1819. I have been unable to ascertain whether or not the parties in these cases respectively were subject to the School of Benares. In case No. 58 it was decided in 1810, that an adoption by a Brahman of his sister's son was valid. In case No. 59 it was decided in 1815 that a Brahman could not adopt his sister's son, as such an adoption imports incest. In case No. 60, it was decided in 1818 that among Brahmans, a widow cannot adopt her uncle's son, as she could not be his mother on the ground of incest.

As the cases to which we were referred which were decided in Madras and Bombay, and in which it was held that amongst the three regenerate classes an adoption of a sister's son, or of a daughter's son or of the son of a mother's sister was invalid, related not to Hindus of the Benares School or of these provinces, but to schools of Hindu law in districts with which we in this Court in this case are not concerned, and as it appeared to me from a consideration of those cases that it was, not by the people of those schools and districts, but by the High Court Judges on behalf of the people and contrary to the wishes and usages of the people, that the prohibitions and interpretations of the Dattaka Mimansa of Nanda Pandita, of the Dattaka Chandrika, and of Mr. Sutherland had been accepted and adopted, I thought it unnecessary to refer to those decisions. However, as it appears that one, if not both, of the Judges

of this Bench who are in the minority, appears to consider that the questions as to the authority to be allowed to those commentaries, the questions as to the true construction of the text of Saunaka, and the question as to the onus of proof in this case are practically concluded by the decisions in those cases in Madras and Bombay, it is necessary for me to refer to them, and I shall do so as briefly as I can. To prevent the establishment of a precedent in this Court I think it advisable to point out that the decision of a High Court in India is not binding upon any other of those High Courts, except in cases to which the principle of *res judicata* applies, and that when that principle does not apply a High Court, although it should give due consideration to the reasons stated by another High Court for its decision, is not bound to follow that decision unless it agrees with it.

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The earliest decided case in Madras of which we have a report in the Library of this Court is *Narasammal v. Balaramachariu* (1). That case was from the Andhra country, and I infer from the judgment that the Madras High Court considered that, although an adoption of a sister's son by a Brahman might be valid in the Dravida country, such an adoption in the Andhra country could not be supported even by proof of a custom. The learned Judges said:—"This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority, against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of justice bound to administer the law." The first observation to be made on that passage is that if no custom could be received as valid until it had received the sanction of a Court of law, it is impossible that any custom could ever have been established as valid; and as the learned Judges stated that the case before them was one of first impression, they, apparently holding that view as to the proof of a custom, consequently scouted the idea that there could be a valid custom for such an adoption and decided the case on

(1) Mad. H. C. Rep. 1862-3, 420.

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"the express language of the greatest authorities" who were according to them—Mr. Sutherland in his Synopsis, Nanda Pandita in his Dattaka Mimansa and the author of the Dattaka Chandrika, and paid no attention to what Mr. Ellis had written, or to what Mr. Justice Strange had, according to them, laid down in the second edition of his manual—"That usage has sanctioned the departure from the rule to the extent that there (the Madras Presidency) a daughter's son or a sister's son may be adopted." The rule referred to was the prohibition of Nanda Pandita and Mr. Sutherland. It is to be observed that the Full Benches of the Madras High Court did not take the same view as to how a valid custom might be established when they held that the Brahmans in *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) had established a valid custom amongst Nambudri Brahmans to adopt a sister's son, and in *Vayidinada v. Appu* (2), where they held that a valid custom exists amongst Brahmans in Southern India to adopt a sister's son and a daughter's son. The learned Judges in *Narasammal v. Balaramacharlu* may, for all I know, have been correct in assuming that in Madras the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika were of the number of "the greatest authorities."

The next case in Madras was *Jivani Bhai v. Jiru Bhai* (3). That case was decided upon another point, but this is what the learned Judges said on the question of adoption:—"On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of authority amongst the Pandits, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid. It will perhaps be found that the allegation of custom in this case will be found to amount simply to an allegation that people do that which the law has forbidden." That was a sweeping assertion. We are not told what were the authorities which "are all perfectly consistent in declaring such adoptions invalid." Possibly Manu, the Mitakshara and several other

(1) I.L.R., 7 Mad., 3.

(2) I.L.R., 9 Mad., 44.

(3) Mad. H.C. Rep. 1864 5, 462.

authorities of the School of Benares, none of which suggest any such prohibition, were in 1865 not considered by those learned Judges to be authorities in Madras or Southern India.

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The next case in Madras was *Gop. Luggan v. Raghupatnam* (1). That is a case which should be carefully studied by any one who is anxious to ascertain how far High Courts in India have, in setting up the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika as the sole law to be followed by Hindus on this question of adoption, disregarded and trampled upon the usages of the people. It was a case of the adoption of a sister's son by a Brahman. The Civil Judge found on evidence that a custom to make such adoptions was valid. He said in his judgment—"If it were now attempted to be declared that such adoptions were illegal in Southern India, there would be only one course to pursue, viz., a similar one to that some years ago acted upon in England in the matter of marriage with deceased wife's sisters, that is to pass an Act declaring all such adoptions already made to be legal, but to prohibit them in future. Otherwise the most frightful confusion would be imported into very many families in this district alone." According to the Madras High Court the particular Civil Judge was a Judge of "great experience," but as the High Court considered that according to "the writers of all schools," the adoption by a Brahman of his sister's son was not valid (who those writers were we are not told), they remanded an issue as to the existence of a customary law, and in doing so gave two directions, of which the following is the most important:—"The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence." "In return to this issue the Civil Judge (E. F. Webster) found (on a consideration of oral evidence alone) that the custom has been shown to be uniform because uninterrupted. That the existence of the custom goes back as far as 131 years, and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those amongst

(1) Mad. H.C. Rep. 1871-2, 250.

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the people who are acquainted with the Shastras that such adoptions are valid, all go distinctly to show a conviction among the people that they were acting in accordance with law, and I therefore find the issue sent down in the affirmative." One would have thought that in Madras, at any rate, upon that evidence and that finding this fetish of the Dattaka Mimansa of Nanda Pandita would have been laid for ever. But it was not so; the High Court found that "there was no evidence justifying the setting up of a rule of law opposed to all authorities, and specifically to the one declared by almost the only skilled witness examined in favour of the custom to be binding in the very district in which it was sought to enforce it." What were the authorities which prevented the High Court from acting on that evidence?

The next two cases in Madras were the Full Bench cases of *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (1) and *Vayidinada v. Appu* (2) in which, respectively, the custom amongst Nambudri Brahmans to adopt a sister's son, and the custom in Southern India amongst Brahmans to adopt a sister's son and a daughter's son, was held valid notwithstanding the previous decisions of that Court and notwithstanding Mr. Sutherland, the Dattaka Mimansa of Nanda Pandita and the Dattaka Chandrika. Neither of these commentaries are referred to in the judgment in the former of those two cases, and in the latter of those two cases, although the text of Saunaka as given in the Dattaka Mimansa of Nanda Pandita is discussed and compared with the text of Saunaka as given by another commentator, not one word is said in the judgment about the text said by Nanda Pandita to be a text of Sākalya. The Full Bench evidently placed no reliance upon the latter text.

The next reported case in Madras is *Minskhi v. Romanoda* (3). That case was decided on that part of the Dattaka Mimansa of Nanda Pandita which was a commentary on the text of Saunaka; and again no reference is made in support of the opinion of the

(1) I. L. R., 7 Mad., 3.

(2) I. L. R., 9 Mad., 44.

(3) I. L. R., 11 Mad., 49.

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Court to the alleged text of *Sākalya*. In that case one important matter was that the Court held that Mr. Sutherland had mistranslated the concluding words of paragraph 20 of section II of the *Dattaka Mimāṃsā* of Nanda Pandita. In that case the Court did not refer to the *Dattaka Chandrika*.

The result of a consideration of the reported cases from Madras appears to me to be that whenever the Madras High Court permitted the parties to call evidence to contradict the *Dattaka Chandrika* and the *Dattaka Mimāṃsā* of Nanda Pandita, the result was that the prohibitions of those two commentaries were discredited and were proved not to have been accepted by the people.

I shall now briefly refer to the three cases decided in Bombay of which the reports are accessible to me, and in which the factum of the adoption was found. There was one case in Bombay, and there may have been more, in which the factum of the adoption was not proved.

The first case in Bombay of which I have a report is *Ganpatra Vireskhar v. Vitkeba Khandappa* (1). Notwithstanding the attempts which have been made to explain away the decision in that case on the statement, which appears to be well founded, that the parties were in fact Sudras, yet the references in the judgment to the case in the Privy Council which had been relied upon in support of the validity of the adoption of a sister's son, which in fact had taken place, leads me to the conclusion that Sir Richard Couch, C.J., and Newton and Warden, JJ., considered that the parties were Vaishyas, one of the three regenerate classes of Hindus, when they held that the adoption of a sister's son having taken place could not be set aside. The arguments of the Vakils on each side depended according to the report on the supposed fact that the parties belonged to one of the three regenerate classes and no one had at any time suggested that the adoption of sister's son by a Sudra would not be valid.

The next case in Bombay is *Gopal Narkar Safray v. Hanmant Ganesh Safray* and *Ganesh Ramchandra Safray* (2). In that case

(1) 4 Bom. H. C. Rep. A. C. 190.

(2) I. L. R., 3 Bom., 273.

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the Bombay High Court, disregarding the previous ruling of its own court in *Ganpetra Vireshrar v. Vithoba Khandappa* (1), held that the members of the three regenerate classes were absolutely prohibited from, and incapable of, adopting a sister's son or a daughter's son or the son of any other woman whom they could not marry by reason of propinquity, and that the burden of proving a special custom to the contrary lay upon him who alleged the custom. The court accepted the text said by Nanda Pandita to be a text of Sākalya without any enquiry as to its authenticity. One of the authorities relied upon in that case was the Dattaka Chandrika which the court supposed to have been the work of Devanda Bhatta; another of the authorities relied upon was *Luchmeenauth Rao Naik Kaliya v. Musummat Bhina Bae* (2), which had not decided, as it was assumed by the Bombay High Court that it had, that the adoption of a sister's son by a Brahman in these provinces was invalid; two of the other cases relied upon were *Narasammal v. Balaramachariu* (3) and *Gopalayyan v. Raghupatiayyan* (4) upon which I have already commented.

In *Bhagirithibai v. Radhabai* (5), the court followed the decision to which I have last referred.

I have now referred to all the cases of which I am aware and to the reports of which I have access in which the prohibitions of Nanda Pandita and Mr. Sutherland were adopted. It appears to me that the courts on the authority of Mr. Sutherland or of Sir William Macnaghten and of those who echoed their statements accepted the prohibition of Nanda Pandita and his glosses and interpretations of texts and applied them to the Hindus in most of those cases without any enquiry at all, and in some of them without any adequate enquiry, as to whether those prohibitions, those glosses and interpretations, and those texts were justified or had ever been accepted by the Hindus of the schools to which the cases related. Further, it appears to me that in the remainder of those cases the Judges acted on the assumption that on questions

(1) 4 Bom. H. C. Rep. A. C. 130.

(2) 7, S. D. A., N.-W. P., 441.

(3) Mad. H. C. Rep., 1862—3, 420.

(4) Mad. H. C. Rep., 1871—2, 250.

(5) I. L. R., 3 Bom., 298.

of adoption the usages of the people were to be completely disregarded and to be treated as not worthy of consideration, if, unfortunately for the people, their usages conflicted with the prohibitions of Nanda Pandita and of Mr. Sutherland.

So much confusion has been imported into this case by the unwarranted assumption that the Hindus of these provinces who are subject to the School of Benares have moulded their usages so as to bring them into accordance with the rulings of High Court Judges of Madras and Bombay, that I must point out that a dispassionate consideration of the reported cases from Madras shows that those rulings have not had the effect, even in Madras, which we are asked to assume that they have had in these provinces. No matter what may have been the effect of those rulings upon the usages of the people in Madras and Bombay, what we have to act upon in this case is the law of the School of Benares.

So far as this point before us is concerned, I consider that the question as to whether amongst the three regenerate classes in these provinces which are subject to the Benares School of Hindu Law, an adoption of a sister's son, of a daughter's son, and of the son of a sister of the mother of an adopter is, according to the texts of the Hindu law, permissible or is prohibited is not concluded by authority, and we are entitled to express our opinion upon it in this case. There is in my opinion absolutely no proof, clear or otherwise, that the prohibitions of Nanda Pandita and Mr. Sutherland against such adoptions have ever been received by the Benares School of Hindu Law and sanctioned by usage in these provinces; indeed case XII in the second volume of Macnaghten's *Hindu Law* and the case in 7 S. D. A., N.-W. P., 441, suggests to my mind that no such prohibition had down to 1852 been recognised or adopted in these provinces. Further, in my opinion, it has not been shown that any text of the Hindu law of the Benares School contains any such prohibition.

In my opinion, it has not been shown that the adoption in this case, if it in fact took place, by Madho Singh of his mother's sister's son was prohibited or illegal by the law of the Benares School which

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applies in these provinces and to the parties. If it were necessary, I would be prepared to go further and to hold that the adoption of a son of a mother's sister amongst the three regenerate classes of Hindus subject to the School of Benares is not only not prohibited, but is valid. I would set aside the decree under appeal on this preliminary point and remand the case under section 562 of the Code of Civil Procedure.

KNOX, J.—I have had full opportunity for carefully studying the very able and exhaustive judgment of the learned Chief Justice. It would be waste of time to go over the same ground. I concur fully in holding that what the respondents ask us to accept as an undisputed doctrine of Hindu law cannot be accepted as such; that it was for the respondents to establish that the so-called undisputed doctrine of Hindu law under which they impeach the adoption of Bhagwan Singh had been accepted in and sanctioned by the usage of the Benares School, and that as they have not done this the case must be remanded under s. 562 of the Code of Civil Procedure.

The texts pressed upon us by the respondents for acceptance are texts from the Smṛiti of Saunaka and a text said to be a text of Śākalya.

On the texts from the Smṛiti of Saunaka, Nanda Pandita in his Dattaka Mimāṃsa bases all the several reasons he puts forward for pronouncing that the adoption of a daughter's son, a sister's son and a mother's sister's son is invalid. The fragment said to be from Śākalya is added as a text corroborating his teaching upon the subject.

Dr. Bühler in a very interesting paper reproduced in the Journal of the Asiatic Society, 1866, p. 149, gives the text and translation of a manuscript known to Sastris as the Brihat Saunaka Smṛiti. It is termed Saunakya Karika, and is the work which Nanda Pandita and other writers on adoption quote. Dr. Bühler collated his manuscript with the text as reproduced in the Dattaka Mimāṃsa, the Dattaka Chandrika, the Vyavāhāra Mayukha and the Sanskara Kaustubha with this result. The first of the two

passages on which Nanda Pandita relies, as quoted by Nanda Pandita, differs materially from the text as quoted by other commentators, and it also differs from the manuscript in the possession of Dr. Bühler. The passage as quoted by all the commentators consists of two ordinary slokas, and of the text of those slokas there are no less than five different readings. The Dattaka Chandrika alone agrees with the Dattaka Mimansa as to the language of the original text. As Nilkantha in the Vyavahāra Mayukha quotes the original text, the inference is that this form of adoption is valid amongst all classes, Sudras included. The text of Dr. Bühler's manuscript favours the readings given by Nilkantha, though differing from it. By substituting a "but" (तु) for an "and" (चापि) the Dattaka Mimansa and the Dattaka Chandrika bring out a prohibition. But the Dattaka Mimansa alone goes further and inserts half a sloka which runs as follows:—

ब्राह्मनादित्रये नास्ति भागिनेयः सुतः क्वचित् which means that "amongst the three castes beginning with the Brahmans a sister's son is nowhere adopted."

This half sloka is not to be found in the text as reproduced by any of the other commentators, and, coming in as a half sloka by itself, it raises the suspicion that it is a passage interpolated into the original text in order to strengthen the reading of the preceding text where it differs from the texts as given by the other commentators.

In the second of the texts on which Nanda Pandita relies there is a reading which, if the true one, would most seriously affect the value of the comments made by Nanda Pandita. It is the text which was quoted so often at the hearing and which contains the word पुचक्षायावहं. The latter half of this word is exactly reproduced in the Greek 'σκίρπορς,' and its literal meaning is "bearing the shadow." Nanda Pandita translates it as "bearing the resemblance of a son," and on this one word he builds up the whole of his theory that the boy must be one who was capable of having sprung from the adopter through *Niyog*. If the original text does

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not contain the word पुत्रदायावहं the groundwork for all this doctrine fails, and the fabric built upon it melts into thin air. The author of the Sanskara Kaustubha also quotes the same text from the Smṛiti of Saunaka, but, according to him, the text runs:— वस्त्रादिभिरलंकृत्य ह्यवदायागतं सुतं, a reading which at first blush seems more natural and suitable. It means “the boy having been adorned with clothes and ornaments and having come under the shadow of an umbrella.” If this reading be the true reading of Saunaka’s text, not even the ingenuity of Nanda Pandita could have evolved out of ह्यवदायागतं the idea of “*Niyoga*.”

Even if the reading given by Nanda Pandita is the accurate one, I still cannot and do not accept the strained interpretation which he brings out of पुत्रदायावहं. The natural meaning is that the boy, who before adoption was no son of his adoptive father, now bears the representation of a son. I am not prepared to abandon this natural meaning and to accept the confused array of errors which Nanda Pandita has evolved. This subject has been so fully treated by the learned Chief Justice that I will say no more than that I fully concur with what he has said on Nanda Pandita’s comments on his texts.

Is it strange that I should view with some distrust the meaning given in the Dattaka Mimamsa when I find such material differences in the reading of both the texts quoted by Nanda Pandita as the authority for his law? I am not ignorant of the fact that the Vyavahāra Mayukha and the Sanskara Kaustubha are not authorities in the Benares School, but all profess to reproduce a genuine and identical text of a Dharmasāstri. Some one must have read or remembered wrongly the original text, and, in the absence of evidence, how am I to decide which was the true version of the text as it stood in the original?

It is impossible to examine critically the small fragment said to be quoted from Śākalya. It stands without beginning, without end, and with no reference as to the work from which it is taken. It may not be Śākalya’s at all. Nanda Pandita is known to have

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erred in references before. It may be a text of Sākalya, but, without the context, I decline to draw any inference of any kind from it.

These criticisms would be totally uncalled for and out of place if there were before me evidence that the Benares School had taken Nanda Pandita's reading of Saunaka as the correct one, or given to his interpretation of it the sanction of usage. But it is otherwise when I am asked to accept them as genuine and undoubted texts of Hindu law accurately quoted and accurately interpreted.

I would answer the reference in the manner proposed by the learned Chief Justice.

BLAIR, J.—I concur in the order proposed by the Chief Justice and in the reasoning by which he has arrived at his conclusion. I am not satisfied that Nanda Pandita has been accepted in the provinces governed by the Mitakshara as an undoubted authority upon the law of the Benares School. I think the texts cited by him are by no means certain to be accurate and complete, or to have been correctly construed by him and later commentators. In the absence therefore of evidence of usage having the force of law, I must decline to impose upon the Hindu community restrictions which are not proved to have obtained their general and continued sanction.

BURKITT, J.—I fully concur in the very elaborate and exhaustive judgment which has just been pronounced by the learned Chief Justice, and in the terms of reasoning on which it is founded. I will only add that that judgment does not impose any restriction on any class of Hindus in the matter of adoption. It does not make it compulsory on any Hindu to adopt his daughter's son, or his sister's son, or the son of his mother's sister. It does no more than lay down that such an adoption, if made, is not invalid according to the law of the Benares School. I quite fail to see how such an exposition of the law of that school can have the effect of "shaking settled titles," as my brother Banerji appears to apprehend.

I would set aside the decree under appeal, and would remand the case under the provisions of s. 562 of the Code of Civil Procedure to the Court against whose decree this appeal is made, with directions to proceed to determine the suit on the merits.

REVISIONAL CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SARMAN LAL (PLAINTIFF) V. KHUBAN AND OTHERS (DEFENDANTS).*

Revision—Act No. IX of 1887 (Provincial Small Cause Courts Act), s. 25—Civil Procedure Code, s. 622—Grounds upon which an application for revision under s. 25 of Act No. IX of 1887 will be entertained.

It is no ground for revision under s. 25 of Act No. IX of 1887 that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *Amir Hassan Khan v. Sheo Baksh Singh* (1) referred to.

THIS was an application to revise a judgment and decree of a Court of Small Causes, the sole ground being that the Court had dismissed the suit on an erroneous finding as to a question of limitation. The case was referred to the Full Bench for decision as to the principles upon which s. 25 of Act No. IX of 1887 ought to be applied. (See I. L. R., 16 All., 476.) After the decision of the Full Bench the case was returned to a Division Bench for disposal.

Babu *Jogindro Nath Chaudhri* for the applicant.

The opposite parties were not represented.

BLAIR and BURKITT, JJ.—This application for revision is based upon the allegation that the Small Cause Court, which is the Court of original jurisdiction, had tried and wrongly decided a question of limitation. We are asked now in this application under s. 25 of Act IX of 1887 to re-open that question in revision. Our attention has been called to the Full Bench judgment of this Court in this case in answer to a reference by one of our number. It was there argued that s. 25 of the Small Cause Court Act was not simply co-extensive with s. 622 of the Code of Civil Procedure. We all were of opinion that in the exercise of our discretion we ought to apply to cases brought before us under s. 25 of Act IX of 1887 the general principle embodied in s. 622 of the Code of Civil Procedure. The ruling of the Court was itself to this effect, that the considerations to be applied to such an application for revision as

*Civil Revision No. 5 of 1894, from an order of the Judge of the Court of Small Causes at Agra, dated the 10th October 1893.

I. L. R., 11, Calc., 6.

this did not differ materially from those applicable under s. 622, and which were applied before the decision of the case *Amir Hassan Khan v. Shro Bikh Singh* by their Lordships of the Privy Council. The case was reported in L. L. R., 11 Calc., 6. It appears to us that we have no clear and satisfactory guidance from the decided cases as to what was held by this Court to be the scope of s. 622 before the clear and definite ruling in that case. It seems quite certain that there was no consistent course of decision in this Court. Abundance of rulings can be found, some entertaining wider and some entertaining narrower views of the limitations imposed by that section. We consider the closer and stricter interpretation to be most in accord with the intention of the Legislature, and we therefore in our discretion refuse to try in revision, and to reopen the questions of law and fact which have in the exercise of its jurisdiction been decided upon evidence by a Court whose decision upon such a point has been made final by law. We reject the application.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

MUHAMMAD HUSAIN (PLAINTIFF) v. BADRI PRASAD (DEFENDANT).*

Act No. XII of 1881 (N.-W. P. Rent Act), s. 93 - Suit by recorded co-sharer for recorded share of profits—Adverse possession.

The mere circumstance that a co-sharer's name is recorded in the Revenue papers will not prevent a suit by him for his share of profits being barred by limitation if in fact he has received no profits for more than twelve years prior to such suit. *Maksood Ali Khan v. Ghazee-ood-deen* (1) and *Tulshi Singh v. Lachman Singh* (2) followed.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Madho Prasad* for the appellant.

Mr. *A. H. S. Reid* for the respondent.

* Second Appeal No. 707 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 28th March 1894, reversing a decree of Babu Dalthamban Singh, Assistant Collector, 1st class, dated the 27th September 1889.

(1) N.-W. P., H. C. Rep., 1863, p. 153.

(2) Weekly Notes, 1881, p. 20.

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AIKMAN, J.—This was a suit under clause (4) of s. 93 of Act No. XII of 1881 to recover profits for the years 1293, 1294 and 1295 F. The defence was that, although the plaintiff had purchased this property about 21 years ago, he had never got possession of it, and that for upwards of 12 years the defendant had been in adverse possession. The Court of first instance, the Assistant Collector of Aligarh, decreed plaintiff's claim in part. On appeal this decree was reversed by the learned District Judge, who dismissed the plaintiff's claim. The plaintiff comes here in second appeal. The plaintiff relies on the fact that he is a recorded co-sharer. He does not assert that he ever received profits of the shares of which he is recorded as being in possession. It appears that he brought a suit to recover the profits for 1283 Fasli which would fall due on the 1st of August 1876. There is nothing on the record to show when this suit was brought; but it appears from a copy of the Assistant Collector's judgment that it was decided on the 26th of August 1879. From that judgment it appears that the defendants to that suit raised a plea similar to that which is now put forward, namely, that the plaintiff had never received any portion of the profits. The Assistant Collector in 1879 gave the plaintiff a decree, but this decree was set aside in appeal, for what reasons does not appear, as no copy of the appellate judgment is produced. In appeal it is urged that the plaintiff's claim was not barred by any adverse title acquired by the defendant, inasmuch as the defendant for the first time in 1879 denied the plaintiff's title. With regard to that plea I would observe that it is not shown that it was in 1879 that the defendant first denied the plaintiff's title. From the defence in the former suit and from the fact that it is not shown that the plaintiff ever received any profits from this share, I infer that the defendant has all along denied the plaintiff's title. The rulings of this Court in *Maksood Ali Khan v. Ghazee-ood-deen* (1) and *Tulshi Singh v. Lachman Singh* (2) are clearly in the respondent's favor. In my opinion the decision of the lower appellate Court is right. I dismiss this appeal with costs.

Appeal dismissed.

(1) N.W. P. H. C. Rep., 1888, p. 158.

(2) Weekly Notes, 1881, p. 20.

Before Mr. Justice Aikman.

1895
March 6.

LAKHMI CHAND (DECREE-HOLDER) v. BALLAM DAS (JUDGMENT-DEBTOR). *

Execution of decree Limitation—Execution stayed by reason of an injunction for more than three years—Revival of previous application for execution.

A decree-holder in execution of his decree attached a decree held by his judgment-debtor. On the 3rd of July 1883 the decree-holder applied for execution of his decree by enforcement of the second decree, and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July 1883 until the suit was decided. The application for execution was thereupon struck off, but the attachment was maintained. On the 19th of March 1892 the suit was dismissed and the injunction came to an end. On the 29th of October 1892 a fresh application was made for execution.

Held that this second application was not barred by limitation, but was to be regarded as an application to renew the proceedings commenced by the former application, which had been suspended by the act of the Court and not by anything for which the decree-holder was responsible. *Peary Mohun Chowdhry v. Romesh Chunder Nundy* (1); *Kalyanbhai Dipchand v. Ghanashamlal Jadunathji* (2) and *Paras Ram v. Gardner* (3) referred to.

THE facts of this case are fully stated in the judgment of Aikman, J.

Mr. *Abdul Majid* for the appellant.

Maulvi *Muhammad Ishaq* for the respondent.

AIKMAN, J.—On the 18th of May 1887 Lakhmi Chand, the appellant in the case, got a decree against certain persons, amongst whom were two men named Sham Chand and Shiam Sundar Lal. These two judgment-debtors had, on the 24th of December 1884, got a decree against one Ballam Das, the respondent in this appeal. On Babu Lakhmi Chand's application that decree of the 24th of December 1884 was attached on the 15th of June 1887, under the provisions of s. 273 of the Code of Civil Procedure, in execution of his decree. Both decrees were passed by the same Court. The law

Second Appeal No. 693 of 1894, from an order of J. Denman, Esq., District Judge of Benares, dated the 25th April 1894, confirming an order of Babu Nil Madhub Roy, Subordinate Judge of Benares, dated the 24th June 1893.

(1) I. L. R., 15 Calc., 371.

(2) I. L. R., 5 Bom., 29.

(3) I. L. R., 1 All., 355.

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is not quite clear as to what should be done by an attaching decree-holder in such a case, but it has been held in *Pearry Mohun Chowdhry v. Romesh Chander Nundy* (1) that a person attaching a decree is a representative of the decree-holder within the meaning of s. 244, cl. (c) of the Code of Civil Procedure, and is entitled to have execution of the attached decree enforced on his application, and with this opinion I entirely concur.

On the 3rd of July 1888, Lakhmi Chand applied for the execution of his own decree by enforcement of the decree of 1884 against the property of Ballam Das and by crediting the sale-proceeds to the applicant's decree. Notice was issued to Ballam Das under the provisions of s. 248 of the Code. He showed no cause against the execution, and accordingly certain property belonging to him was attached on the 31st of July 1888, and ordered to be sold on the 17th of January 1889. In the meanwhile Manni Lal, the son of Ballam Das, brought a regular suit to have it declared that the property attached as belonging to Ballam Das was in reality his (that is, Manni Lal's) property. An injunction was issued by the Court in which this suit was filed staying the execution against Ballam Das which was then in progress. On the 30th of January 1889, on the motion of the decree-holder's pleader, the execution case was filed with liberty to him to proceed with it when the injunction was taken off, the attachment of Ballam Das' property being maintained. On the 19th of March 1892 Manni Lal's suit was dismissed, and with the dismissal of this suit the injunction came to an end after having been in force for upwards of three years. On the 29th of October 1892 the present application was made asking that the decree of 1884 should be executed and the money realized by its execution should be applied in satisfaction of the decree of the attaching creditor. The judgment-debtor, Ballam Das, objected that the attached decree had become barred by limitation. Both the Subordinate Judge and the District Judge have sustained the plea and dismissed the appellant's application. Hence the appeal to this Court.

(1) I. L. R., 15 Calc., 371.

In my opinion the lower Courts were clearly wrong in refusing the application. At the time when the application of the 3rd of July 1888 was made the decree against the respondent was alive. It is true that upwards of three years had elapsed between the date of that and the date of the present application; but this is due to no fault or laches of the attaching creditor, but to this fact that the proceedings in execution were stayed by an order of Court. Section 15 of the Indian Limitation Act provides for the exclusion from the period of limitation of the time during which an injunction has continued in force, but this provision applies only to suits and does not extend to applications. I think it is unfortunate that the Legislature did not make clear provision in the Limitation Act for a case like the present. In a case somewhat similar to the present case—*Kalyanbhai Dipchand v. Ghanshamlal Jadunathji* (1)—Melville, J., commented on the “monstrous injustice” that would ensue if art. 179 of Act No. XV of 1877, which governs the execution of decrees, were applied strictly to cases like the present. Courts in this country have frequently been struck by the difficulty caused by the defect in the Limitation Act adverted to above. Sometimes the difficulty has been got over by holding that art. 178 of the Act applies. That article allows a period of three years’ limitation for “applications for which no period of limitation is provided elsewhere in the schedule or by the Code of Civil Procedure, s. 230.” This period runs from the time when the right to apply accrues. Other Courts, and amongst them a Full Bench of this Court in *Paras Ram v. Gardner* (2), have held that a renewed application for execution is not a fresh application, but a continuance or revival of the previous application which had been interrupted owing to a cause for which the appellant was not responsible. Looking to the terms of the order of the 30th of January 1889, which was passed in this case, I prefer to regard the present application as an application to renew the previous proceeding which was in abeyance owing to the injunction. In this view the decree-holder’s application was not in any way barred. I am unable to follow the lower Courts in

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(1) I. L. R., 5 Bom., 29.

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their opinion that no application was ever made to execute the attached decree of the attaching creditor. Not only was the application of the 3rd of July, 1888 an application to execute the attached decree, but the application was granted. It was objected by the learned vakil for the respondent that the application of the 3rd of July 1888 was defective, inasmuch as it did not give all the particulars required by s. 235 of the Code of Civil Procedure in regard to the attached decree. In my opinion the particulars which the application gives were sufficient, and in any case the judgment-debtor, by neglecting to show any cause against the execution when opportunity was given him, has, I hold, lost his right to rely on any objection of this nature. For the above reasons I decree the appeal with costs in all Courts, and, setting aside the orders of the lower Courts, remand the case under the provisions of s. 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

1895
March 6.

Before Mr. Justice Knox and Mr. Justice Burkitt.

MANOHAR SINGH (PLAINTIFF) v. SUMIRTA KUAR (DEFENDANT).*

Burden of proof—Mortgage deed—Recitals in instrument—Act No. III of 1877 (Indian Registration Act), ss. 59, 60—Evidence.

In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction-sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. *Held* that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877, were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshwore Peshakar v. Budhanuddi* (1) referred to.

*Second Appeal No. 915 of 1893, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 15th May 1893, confirming a decree of Saiyid Akbar Hussain, Subordinate Judge of Cawnpore, dated the 4th April 1892.

(1) I. L. R. 6 Cal., 263.

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One Manohar Singh brought a suit upon a deed of conditional sale, claiming either payment of the mortgage-debt or foreclosure of the mortgage, against the heirs of the mortgagor and against one Musammat Sumirta Kuar, who had purchased the property claimed at auction-sale under a decree of a Revenue Court, and, as the plaintiff alleged, with knowledge of his (the plaintiff's) mortgage over the property.

Of the defendants, heirs of the alleged mortgagor, one did not enter an appearance, and the rest confessed judgment. The defendant auction-purchaser, however, filed a written statement in which she pleaded that the plaintiff's deed was executed by the mortgagor, who was a near relation of his, fictitiously and collusively and without consideration. She also objected to the amount of interest claimed.

On these pleadings the Court of first instance (Subordinate Judge of Cawnpore) found that no consideration had passed under the deed sued upon and that the transaction was collusive, and accordingly dismissed the suit as against Musammat Sumirta Kuar.

On appeal the lower appellate Court (District Judge of Cawnpore) agreed with the findings of the Court of first instance as to collusion and absence of consideration and dismissed the appeal.

The plaintiff appealed to the High Court chiefly on the ground that the lower Courts had wrongly placed the burden of proving payment of consideration on the plaintiff.

Pandit *Moti Lal* and Babu *Durga Charan Banerji* for the appellant.

Mr. *T. Conlan* and Pandit *Sundar Lal* for the respondent.

KNOX and BURKITT, JJ.—The sole point which arises for decision in this second appeal is whether the Courts below have erred in law in throwing the burden of proof of actual payment of the mortgage-money on appellant, who was plaintiff.

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There is no doubt that if the burden of proof was rightly laid, the findings of fact arrived at by the lower appellate Court are sufficient for the determination of the appeal and cannot be disputed. The respondent was in possession of the property in dispute, having purchased the same under a sale following a decree of a Rent Court dated the 16th of January 1888, the date of the sale being the 20th of August 1891. The appellant sought to recover possession of the same property on a registered deed of mortgage by conditional sale over the same property purporting to have been executed in his favor on the 19th of August 1886. The respondent virtually put the appellant to proof of the document under which he claimed, and what is contended before us is that, upon the mere production by the appellant of the deed of mortgage which had been thus questioned, and on the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under the Indian Registration Act, s. 59 the burden of proof had then and there shifted on to the shoulders of the respondent. Precisely the same question was considered in *Brjeshware Peshkar v. Budhanuddi* (1). We fully concur in the law laid down by the Chief Justice at pages 277 and 278, where he says that in his opinion in that case "the effect of the recital as well as the decision of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlut Singh* has been misunderstood. A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, *as against the parties who make it*, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be." To the same effect is s. 60 of Act No. III of 1877 which does not provide that a certificate signed by a Registering Officer shall be considered conclusive proof, but simply provides that it may be admissible for the purpose of proving that the facts mentioned in the endorsement referred to in s. 59 have

(1) I. L. R., 6, Calc., 268.

occurred as therein mentioned. It requires more than this, especially where, as in the present case, the surrounding circumstances were suspicious and not explained.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

SETH SHAPURJI NANA BHAI (DECREE-HOLDER) c. SHANKAR DAT DUBE
(OBJECTOR).*

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MANOHAR
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v.
SUMIRTA
KUMAR.

1895
March 6.

Execution of decree—Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.

In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. *Srihary Mantul v. Murari Choudhry* (1).

THE facts of this case sufficiently appear from the judgment of Aikman J.

Munshi *Ram Prasad* and Maulvi *Ghulam Mujtaba* for the appellant.

Pandit *Sundar Lal* and Babu *Kalindi Prasad* for the respondent.

—AIKMAN, J.—The appellant in this case got a money decree from the Court of the Subordinate Judge of Aligarh against one Raja Hari Har Dat Dube, a resident of the district of Jaunpur. The judgment-debtor died after the passing of the decree and before execution had been taken out. After his death the decree-holder applied to the Court which passed the decree to send it for execution to the Court of the Subordinate Judge of Jaunpur. In his application he inserted the name of the respondent Raja Shankar Dat Dube, brother, and Musammat Sahodra, widow, of the deceased judgment-

* Second Appeal No. 694 of 1894, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th April 1894, confirming an order of Babu Mohan Lal, Subordinate Judge of Aligarh, dated the 23rd July 1892.

(1) I. L. R., 13 Calc., 257.

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debtor as his legal representatives. Notice was issued to these two persons to show cause why the decree should not be executed against them. No cause was shown by Musammat Sahodra, but Raja Shankar Dat Dube presented a petition of objection, contending that he was not the heir of the deceased judgment-debtor and that no property of the deceased had come to his hands. The Subordinate Judge of Aligarh found both these issues against him and ordered the transfer of the decree for execution to Jaunpur. Against this order Raja Shankar Dat Dube appealed to the District Judge of Aligarh, repeating in his appeal the same objections as he had raised before the Subordinate Judge. Neither before the Subordinate Judge nor in his appeal to the District Judge did he raise any question as to the jurisdiction of the former Court to decide as to whether or not he was the legal representative of the deceased judgment-debtor. The learned District Judge allowed the appeal, being of opinion that the decision of the Subordinate Judge as to whether the applicant was or was not the heir of the deceased judgment-debtor was *ultra vires*, inasmuch as the question was one to be decided by the Court executing the decree. In second appeal to this Court the decree-holder impugns the correctness of the learned Judge's opinion. I think the appeal must succeed. Although the decree-holder did not refer in his petition to s. 234 of the Code, I think his application amounts to an application under the first paragraph of that section, and from the wording of that section it is in my opinion a question for the Court which passed the decree to decide whether a particular person is or is not the legal representative of a deceased judgment-debtor. But I think the Subordinate Judge was exceeding his powers when he went on to decide as to the amount of property which had come to the hands of the respondent. The Court which passed the decree having decided who is to be regarded as the legal representative, it is for the Court executing the decree to decide as to the extent of that legal representative's liability. I draw this inference from the use of the words "the Court which passed the decree" in the first paragraph, and "the Court executing the decree" in the second paragraph of s. 234 of the Code. So much

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therefore of the Subordinate Judge's decision as referred to the property in the hands of the respondent was *ultra vires*, but in my opinion the Subordinate Judge had jurisdiction to decide as to whether or not the respondent was the legal representative. This was a question properly for the Court which passed the decree, and not for the Court to which the decree was transferred. The learned counsel for the respondent relies on s. 244 cl. (c). This gives the Court executing a decree jurisdiction to determine "questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." But this does not give a Court executing a decree transferred to it jurisdiction to determine who are to be considered the representatives. Any order passed by a Court sending a decree for execution to another Court holding that the decree might be executed against a certain person as the legal representative of the deceased judgment-debtor might, I think, come within the provision of cl. (c) of s. 244 of the Code of Civil Procedure, and a copy of it should be sent to the Court to which the decree is transferred for execution. In this view I am supported by the remarks of Prinsep and Beverley, JJ., in *Srikary Mandul v. Murari Chowdhry* (1). The learned District Judge in his judgment says as follows:—"I agree with the Subordinate Judge that the application of the original applicant (now appellant) should have been dismissed, but the application should have been dismissed on the ground that the Court had no jurisdiction to entertain the application." The meaning of this is not quite clear, but I gather from it that the District Judge merely held that the lower Court ought to have dismissed the application as having no jurisdiction, and did not mean to hold that the application should have been dismissed on its merits. I therefore think that the case must be remanded under s. 562 of the Code of Civil Procedure. I allow this appeal, and, setting aside the order of the lower appellate Court, remand the case under s. 562 of the Code of Civil Procedure with directions to re-admit the appeal under its original

(1) I. L. R., 13 Calc., 257, at p. 262.

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number on the register and proceed to determine it on the merits with reference to the above remarks. The costs will abide the result.

Appeal decreed; cause remanded.

1895

March 8.

Before Sir John Edge, Kt, Chief Justice and Mr. Justice Banerji.

BHIKHARI DAS AND ANOTHER (PLAINTIFFS) v. DALIP SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Sale by mortgagor of part of the mortgaged property—Such sale not to affect the rights of the mortgagee under his mortgage—Act No. IV of 1882, (Transfer of Property Act) s. 88.

The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person. *Lala Dilawar Sahai v. Dewan Bolakiram* (1), *Indukuri Rama Raju v. Yerramilli Subbarayudu* (2) and *Banwari Das v. Muhammad Mashiat* (3) referred to.

This was a suit for sale upon a mortgage of shares in various villages, including a share in a village known as "Fatehpur Shamshoi." The plaintiffs claimed as owners of the bond sued upon by virtue of a partition of the property of the joint family of which they and the original mortgagor had been members. The defendants were the widow and sons of the mortgagor, the original mortgagee, *pro forma*, a person whose name was alleged in the plaint to have been fictitiously entered in the Revenue papers in respect of a portion of the mortgaged property, and one Ram Kishen Das, who had purchased subsequently to the mortgage the mortgaged share in Fatehpur Shamshoi.

The representatives of the original mortgagor put in various defences which it is not necessary here to set forth. Ram Kishen Das pleaded that he had purchased the share in Fatehpur Shamshoi in good faith and for valuable consideration, and that under s. 56 of Act No. IV of 1882, the mortgagees should proceed first against the other properties included in the mortgage-deed in suit.

* First Appeal No. 253 of 1893 from a decree of Bai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 30th August 1893.

(1) I. L. R., 11 Cal. 258.

(2) I. L. R., 5 Mad., 387.

(3) I. L. R., 9 All., 690.

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v.
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The Court of first instance (Subordinate Judge of Sháhjahánpur) gave effect to the contention of the defendant Ram Kishen Das, and ordered that the other hypothecated property should be sold first, but in respect of the other defendants gave the plaintiffs a decree for sale.

The plaintiffs appealed to the High Court as to the method adopted by the Court of first instance in assessing interest on the mortgage bond and they also objected to the postponement of the sale of the interest in mauza Shamshoi.

Pandit *Bishambar Nath* and Pandit *Sundar Lal* for the appellants.

The respondents were not represented.

EDGE, C. J., and BANERJI, J.—This appeal has arisen out of a suit for sale under s. 88 of Act No. IV of 1882. A portion of the property mortgaged was, subsequently to the mortgage, sold to one of the defendants. It was the property known as Fatehpur Shamshoi. The Subordinate Judge gave the plaintiff a decree, but he limited his decree by obliging the plaintiff to have recourse to other mortgaged property before selling the property called Fatehpur Shamshoi. He apparently thought that s. 56 of Act No. IV of 1882 applied to this case. That section has no application here. That section merely applies as between the buyer and the seller and does not limit the rights of a prior mortgagee. This case is not one of those provided for by s. 81 of that Act. The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person. We are fortified in this opinion by the decision in *Lala Dilawar Sahai v. Dewan Bolukiram* (1), *Indukuri Ram Raju v. Yerramilli Subbarayudu* (2) and *Banwari Das v. Muhammad Mashiat* (3).

The Subordinate Judge misunderstood the covenant as to interest. It was a covenant to pay interest at the rate of Rs. 1-12-0 per cent. per mensem and provided for yearly rests, in which case

(1) I. L. R., 11 Calc., 258.

(2) I. L. R., 5 Mad., 387.

(3) I. L. R., 9 All., 690.

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the interest in arrears was to be added to the principal and the aforesaid rate of interest was to be charged on the consolidated sum.

We allow this appeal, and give the plaintiff a decree for sale under s. 88 of Act No. IV of 1882, by which the whole, or such portion of the property mortgaged as may be necessary, may be sold. The amount claimed in the plaint as due up to the commencement of the suit is "Rs. 7,250." We give the defendants until the 7th of September next to redeem the mortgage of the plaintiff on payment of Rs. 7,250, *plus* interest thereon at the rate of Rs. 1-12-0 per cent. per mensem from the date of the institution of the suit down to the date of payment within such period, *plus* the costs of this suit in the Court below and in this appeal in this Court; and if the payment be not made on or before the 7th of September 1895, such interest shall be allowed from the date of the commencement of the suit up to the 7th September 1895. A decree shall be prepared under s. 88 of Act No. IV of 1882.

Appeal decreed.

1895
March 16.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS v. AJUDHIA PRASAD.

Act No. XLV of 1860 (*Indian Penal Code*), s. 193—*Fabricating false evidence*
—*Report made by Amin executing a Civil Court's decree that he had been obstructed*—*Similar report to Police*—*Subsequent deposition in Court*—*Alternative charges.*

Held that a report made by an Amin of a Civil Court deputed to give possession of certain property in execution of a decree, as to his having been obstructed in so doing, to the Court executing the decree, and a similar report made to the Police, would not, even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the *Indian Penal Code*, and consequently, where such Amin was charged in the alternative with making the two reports as above and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement.

The facts of this case were as follows :—

The appellant, Ajudhia Prasad, a Court Amin, was deputed to make over possession of certain property in execution of a decree

He made a report on the 24th of September 1894 to the Court in which the decree was that he had been obstructed in executing the decree by certain persons whom he named. He also made a similar report to the Police. Subsequently, on the 15th of December 1894, Ajudhia Prasad made a deposition with respect to the circumstances of his attempt to execute the decree in question, which appeared to be inconsistent with the two reports formerly made by him. He was accordingly put on his trial for the offence defined by s. 193 of the Indian Penal Code and charged in the alternative with the making of the two reports on the one side, and of the subsequent deposition on the other. He was also charged under s. 211 in respect of the report made to the Police. On these charges Ajudhia Prasad was convicted and sentenced to rigorous imprisonment for one year and one day. Ajudhia Prasad thereupon appealed to the High Court.

The Hon'ble *Mr. Colvin*, Pandit *Moti Lal* and Babu *Durga Charan Banerji* for the appellant.

The Government Pleader (*Munshi Ram Prasad*) for the Crown.

EDGE, C. J., and BANERJI, J.—It is very probable that Ajudhia Prasad's evidence given in December was false evidence, but it has not been shown to us that it has been proved to have been false evidence. The evidence given in December was inconsistent in material points with the statement made in the report submitted to the Court of Small Causes and made to the Police. But there is nothing to show whether it was the earlier statements which were false or the evidence given on the trial which was false. In our opinion he could not have been convicted under s. 193 of the Indian Penal Code in respect of the statement made to the Police, nor in respect of that made in the report in the Court of Small Causes. We do not think that on either occasion he was fabricating evidence, even assuming that the statements were false. Consequently it became necessary for the prosecution to prove that the evidence given in the trial in December was false. We allow the appeal, set aside the conviction and sentence, and acquit Ajudhia Prasad of the charge. The recognizances will be discharged.

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PRASAD.

1895
March 18.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

R. WALL AND ANOTHER (PETITIONERS) v. J. E. HOWARD AND OTHERS
(OPPOSITE PARTIES).*

Letters Patent s. 10, Act No. VI of 1882 (Indian Companies Act), s. 169—Extension of time for serving notice of appeal—No appeal from order of High Court refusing extension—Discretionary order.

No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act No. VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters Patent. *Banno Bibi v. Mehdi Husain* (1), *Muhammad Naim-ullah Khan v. Ihsan-ullah Khan* (2), *Kishen Pershad Panday v. Tiluckdhari Lall* (3), *Latf Ali Khan v. Asgur Raza* (4), *Hurriah Chunder Chowdry v. Kali Sundari Debia* (5), *Mohabir Prosad Singh v. Adhikari Kunwar* (6), *Lane v. Esdaile* (7), *Kay v. Briggs* (8), *The Amstil* (9) and *Ex parte Stevenson* (10) referred to.

THE facts of this case are as follows:—

In 1894 a limited company, the Agra Savings Bank, was being wound up under the supervision of the Court of the District Judge of Allahabad. On the 14th of March 1894 certain shareholders of the Bank, amongst whom were the present appellants, filed a petition in the Court of the District Judge purporting to be under ss. 162 and 214 of the Indian Companies Act, 1882, and having for its object the institution of an inquiry into the conduct of certain directors and auditors of the said Bank in relation to the affairs of the Bank and the ultimate compelling of the directors and auditors named therein to contribute to the assets of the Bank compensation for moneys alleged to have been lost to the Bank through their negligence or misfeasance.

This petition was accepted by the Court, which thereupon framed certain issues to form the subject of an inquiry. Shortly after the

* Appeal No. 31 of 1894, under s. 10 of the Letters Patent, from an order of the Hon'ble Mr. Justice Banerji, dated the 21st of May 1894.

- (1) I. L. R., 11 All. 375.
- (2) I. L. R., 14 All. 226.
- (3) I. L. R., 18 Calc. 183.
- (4) I. L. R., 17 Calc. 455.
- (5) L. R., 10 I. A. 4.

- (6) I. L. R., 21 Calc. 473.
- (7) L. R. [1891] App. Cas. 210.
- (8) L. R. 22 Q. B. D., 343.
- (9) L. R. 2 P. D. N. S., 186.
- (10) L. R. [1892] Q. B. D. Vol. I, 294.

framing of issues on this petition the then incumbent of the office of District Judge of Allahabad retired, and his successor, on the 30th of April, dismissed the petition, so far as it purported to be a petition under s. 214, on the ground that it was premature, and ordered the petitioners to pay costs. The hearing of the petition as a petition for an inquiry under s. 162 was continued for a short time, and then the Judge declined to grant further discovery and ordered the papers to be shelved.

The petitioners, before filing an appeal against the above orders of the District Judge dismissing their petition, applied to the High Court under s. 169 of the Indian Companies Act, 1882, for extension of time for filing their appeal and for giving notice of the appeal, having regard to the restricted period of limitation prescribed by that section; but they omitted to state the reasons which induced them to believe that it would be practically impossible to serve notice of their appeal within the time prescribed. On this application the following order was made :—

“Under s. 169 of Act VI of 1882, which has been referred to in this application, this Court has not in my judgment power to extend the time for filing an appeal from the order of the District Judge which is complained of by the applicants. The only time which the Court of appeal is empowered by that section to extend is the time within which notice of the appeal is required to be given by that section. I am therefore unable to grant the extension asked for as regards the period of limitation for appealing against the order of the Court below. As for the granting of an extension of the time for the service of notice, I am of opinion that such extension cannot be granted except for valid reasons. Such reasons have not been shown to exist in this case. The only reason given in the application is that a copy of the order complained of has not been obtained; but it has not been alleged or shown why the copy has not been obtained. I accordingly refuse this application.”

The petitioners appealed against this order under s. 10 of the Letters Patent.

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Mr. *W. K. Porter* for the appellants.

Messrs. *A. Strachey* and *W. Wullich* for the respondents.

BURKITT J.—In this case an application was made to Mr. Justice Banerji under s. 169 of the Indian Companies Act (Act No. VI of 1882) to grant an extension of time for giving notice of an appeal against an order of the District Judge of Allahabad refusing an application under s. 214 of that Act. An extension of time for filing the appeal was also asked for. The learned Judge refused both applications being of opinion that no sufficient reason for granting them had been shown.

This is an appeal brought under s. 10 of the Letters Patent of this Court against that order of refusal.

Mr. *Strachey* for the respondent takes two preliminary objections against the hearing of the appeal. Firstly, he contends that no appeal lies, because, he says, the order under appeal is not a 'judgment' within the meaning of s. 10 of the Letters Patent, which gives a right of appeal from the judgment (not being a sentence or order passed or made in any criminal trial), of one Judge of the Court. Several cases were cited to us during the argument; but I do not think that they are all in point, as some of them turn on s. 591 of the Code of Civil Procedure. That section, however, is in my opinion not applicable to the present case. I think that section must be read with s. 588, and should be construed as if the words "under this Code" were inserted between the words "by any Court" and the words "in the exercise of." To hold otherwise would have the effect of abolishing many appeals given by Acts of the Legislature passed before Act No. XIV of 1882 came into force, *e.g.*, an appeal to the High Court from the District Judge in this very matter. I am therefore unable to say that the present appeal, which arises out of a right of appeal created by the Indian Companies Act (Act No. VI of 1882) in a matter entirely outside the Code of Civil Procedure, is forbidden by s. 591 of that Code.

In the case of *Banuo Bibi v. Mehdi Husain* (1) it was held by this Court under ss. 588 and 591 of the Code of Civil Procedure,

(1) I. L. R., 11 All. 375.

following certain cases in the Madras High Court that no appeal lay from an order of a single Judge refusing leave to appeal *in formā properis*. For similar reasons in *Muhammad Naim-ullah v. Ihsan-ullah* (1) it was held that an order by a single Judge of the Court amending a decree passed in appeal by a divisional Bench of which he was the only member remaining in the Court was an order from which an appeal was excluded by Chapter XLIII of the Code of Civil Procedure. And in that case the learned Chief Justice defined the "judgment" referred to in s. 10 of the Letters Patent to be "the express decision of a Judge of the Court which leads up to and originates an order or decree," and he pointed out that it was impossible to read together Chapters XLIII and XLV, the latter being the chapter which treats of appeals to Her Majesty in Council.

The next case to which I would refer is that of *Kishen Pershad Panday v. Tiluckdhari Lall* (2). There it was held that no appeal lay under s. 15 of the Letters Patent of the Calcutta Court (corresponding with s. 10 of the Letters Patent of this Court) from an order of a single Judge refusing to extend the time for furnishing security for the costs of an appeal to Her Majesty in Council. The question before the High Court in that case was whether such an order is a "judgment" within the meaning of s. 15 of the Letters Patent. Like the order now under appeal before us the order in that case was one to which the provisions of ss. 538 and 591 of the Code of Civil Procedure did not apply. After citing and discussing several reported cases the learned Judges held that "where an order decides finally any question at issue in the case or the rights of any of the parties to the suit, it is appealable, otherwise not." Among the cases referred to in the judgment of the Court just cited was that of *Lutf Ali Khan v. Asgur Reza* (3). In that case the question was whether an appeal lay against an order of a Judge granting a certificate that the case was a fit one for appeal to the Privy Council, and it was held, after an examination of the case of *Hurrish Chunder Chowdry v. Kali Sundari Debia* (4) that, as the order under appeal was not one deciding, finally or otherwise, any

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(1) I. L. R., 14 All., 226.
(2) I. L. R., 18 Calc., 183.

(3) I. L. R., 17 Cal., 455.
(4) L. R., 10 I. A., 4.

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question at issue in the case or the rights of any of the parties to the suit, it was not appealable.' In *Hurrish Chunder Chowdry v Kali Sundari Debia* it was held that an appeal did lie from the order of a Judge refusing to send down for execution a decree of Her Majesty in Council. In the recent case of *Mohabir Prosad Singh v. Adhikari Kunwar* (1), which was an appeal against an order of a single Judge refusing to stay execution under s. 608 of the Code of Civil Procedure, it was held that "judgment in clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability." In that view of the law the Court held that refusal to stay execution in the exercise of the discretion given by s. 608 to a Judge or Bench of the Court did not affect any "right or liability by determining any question which affects the merits of the dispute between the parties in any sense." In the already cited case of *Muhammad Naim-ullah Khan v. Ihsan-ullah Khan* (2) the meaning and effect of *Hurrish Chunder's* case are fully discussed, and I would add that, as the order of Mr. Justice Pontifex in that case decided that the decree of Her Majesty in Council could not be executed, it undoubtedly did decide a question at issue in the case and the right of the decree-holder to have execution of his decree. The order therefore would have been appealable under the rulings cited above.

In construing the word "judgment" in s. 10 of our Letters Patent, which were prepared in England and use the phraseology of the English Courts, it is impossible to give to it the restricted meaning of the word "judgment" as defined in the Code of Civil Procedure. As used in England it is wide enough to embrace the definitions of decree, judgment and order in that Code. The use of the words "sentence or order" in the exception as to criminal matters is significant. Now the order under appeal here certainly is not a decree nor appealable as such. It is an order by which the learned Judge in the exercise of his judicial discretion refused to grant to the appellants an indulgence which they could not claim as a matter of right. It did not decide any question at issue in the case

(1) I. L. R., 21 Calc. 473.

(2) I. L. R., 14 All. 226.

nor the rights of any of the parties, nor did it lead up to or originate any order or decree. The order was complete in itself and did not require anything further to be done.

It is no doubt the case that the ultimate effect of the order may be to prevent the hearing of the appeal against the order of the District Judge passed under s. 214 of the Companies Act, the appellants not having complied with the requirements of s. 169 as to giving notice. That fact, however, does not in my opinion alter the position. On this matter some cases cited by the learned counsel for the respondents from the English Reports are most instructive. The Appellate Jurisdiction Act, 1876 (39 and 40 Vict., C.59) by s. 3, provided that an appeal should lie to the House of Lords "from any order or judgment" of the Court of Appeal in England. Nevertheless it was held by the House of Lords in *Lane v. Esdaile* (1) that no appeal lay from an order of the Court of Appeal refusing to grant special leave to appeal to it from a judgment of the High Court after the time limited for appealing had expired. By Rule 15 of Order LVIII the Court of Appeal had power to grant special leave, and the result of the refusal was to put an end to the appellate proceedings. But the House of Lords held that the order of the Court of Appeal refusing special leave to appeal was not a "judgment or order" within the meaning of s. 3 of the Appellate Jurisdiction Act. Lord Herschell is reported to have said:—"The matter was intrusted and intended to be intrusted to their (the Court of Appeal's) discretion, and the exercise of a discretion of that sort intrusted to them is not, within the true meaning of the Appellate Jurisdiction Act, an order or judgment from which there can be an appeal." In his judgment Lord Herschell cited with approval the case of *Kay v. Briggs* (2) in the Court of Appeal. In that case the Court of Appeal held, with reference to ss. 19 and 45 of the Judicature Act of 1873, that they had no power to overrule the discretion given by s. 45 of the Act to the Divisional Court to refuse special leave to appeal, notwithstanding that by s. 19 the Court of Appeal had jurisdiction to hear an appeal "from

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(1) L. R., [1891] A. C., 210.

(2) L. R., 22 Q. B. D., 343.

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any judgment or order" of the High Court. It was held that the real meaning of s. 45 is to confine the power to give leave to appeal absolutely to the Divisional Bench, and that the Court of Appeal had no jurisdiction to entertain the application, inasmuch as, if they allowed it, the special leave would be given, not by the Divisional Bench, but by the Court of Appeal, which was not the contingency on which s. 45 provided that the decision of the Divisional Bench should not be final. The decision in that case refusing to interfere with the discretion of the High Court had the same effect as the order in the case under appeal before us may have. It put an end to the intended appeal. In the judgment of the Master of the Rolls in *Kay v. Briggs* the case of "*The Amstel*" (2) was cited as being decisive against the application. In that case the Judge of the Admiralty Division had refused leave to appeal from a judgment of a County Court, leave being necessary because the period (ten days) within which the appeal could be brought had expired. On an appeal founded upon s. 19 of the Judicature Act to the Court of Appeal, Lord Justice James, with the concurrence of the other members of the court, is reported to have said:—"The statute enacts that an appeal from a County Court in an admiralty cause shall not be allowed unless an appeal is lodged within a certain time, but provides that the Judge of the Admiralty Division may allow it to proceed on sufficient cause being shown to his satisfaction for the omission. Cause has not been shown to his satisfaction, and I am of opinion that we have no jurisdiction to interfere." The inference to be drawn from the words just cited is (as in *Lane v. Esdaile*) that, as the Judge of the Admiralty Division was intrusted with a discretion to grant or to refuse leave to appeal, his order passed in the exercise of that discretion was not a judgment or order within the meaning of s. 19 of the Judicature Act. In that case also the effect of the order was to put an end to the appeal. That case is very much on all fours with the appeal before us. In the latter the learned Judge had a discretion to grant or to refuse the extension of time asked for. In the exercise of that discretion he refused the application, as

(2) L. R., 2 P. D. N. S., 186.

he held that the applicant had not made out sufficient reason to warrant his allowing the extension of time asked for.

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I take it that the rule to be deduced from the above cases is that where a Court is invested with jurisdiction to do or to refuse to do a certain act the order passed in the exercise of its discretion in that matter is not a judgment or order within the meaning of s. 19 of the Judicature Act. Those cases no doubt all refer to the refusal of applications for special leave to appeal, but in *Lane v. Esdaile* and in the case of *The Amstil* the application practically asked for an extension of the time limited for appealing, as is the case here.

In the case of *Ex parte Stevenson* (1) it was pointed out by the Lord Chief Justice that the granting of leave to appeal to a jury under the provisions of the Statute 53 and 54, Vic. Cap. 70 was to be granted as the leave of the High Court, and not as the leave of the Judge at Chambers who granted it, and on appeal the Master of the Rolls (p. 611), relying on *Lane v. Esdaile*, laid down the proposition that "wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing final and conclusive, and without appeal unless an appeal from it is expressly given." These words mean of course that the decision of such "legal authority" is not a "judgment or order" within the meaning of s. 19 of the Judicature Act. Now in the present case this Court as the Court of Appeal under s. 169 of the Indian Companies Act is the "legal authority" to which is given the power of extending the time for giving notice of an appeal under that section. By paragraph XII of Rule I of the Rules of Court a single Judge has been intrusted with power to hear and dispose of such an application as that made by the present appellants, just as the Judge at Chambers was empowered in the case last cited. The order passed by such single Judge is therefore the order of the High Court and is not subject to appeal "unless an appeal from it is expressly" given. No express appeal is anywhere provided unless it be by s. 10 of the Letters Patent.

(1) L. R. [1892,] 1 Q. B., 294; A. C. 600.

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On the whole, after carefully considering all the authorities set out above, I am of opinion that no appeal lies in the present case, firstly, because the order under appeal does not decide any question at issue in the case or any right of either party, and secondly, because the order, from which no appeal is expressly given, was passed in the exercise of his judicial discretion by the learned Judge in a matter in which, as representing the whole Court, he had power to decide whether the applicants had made out sufficient cause to his satisfaction for their omission to give notice of their appeal within the time limited by law. An order such as that passed in the present case is, I hold, not a "judgment" within the meaning of s. 10 of the Letters Patent.

The second preliminary objection taken by the learned counsel was that the hearing of this appeal was barred, because notice of it had not been given within three weeks from the date of the order appealed against.

But, as I have decided that no appeal lies from that order, I consider it to be quite unnecessary to discuss the question whether this appeal would or would not have been in time if an appeal were permitted by law.

I would refuse to hear this appeal and would dismiss it with costs.

AIKMAN, J.—Looking to the serious consequences which may result to a litigant from the rejection of an application under s. 169 of the Indian Companies Act for an extension of time, I should have been glad had I been able to hold that an appeal like the present was maintainable, but, as has been shown in the judgment just delivered by my brother Burkitt, the weight of authority both in this country and in England is entirely against so holding. I am therefore of opinion that no appeal lies, and I concur in the order proposed.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

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KALLIAN MAL (DEFENDANT) v. MADAN MOHAN (PLAINTIFF)*

Pre-emption—Wajib-ul-arz—Construction of document—Co-sharer—Holder of resumed mudfi—Act No. XIX of 1873 (N. W. P. Land Revenue Act) s. 62—Rules of the Board of Revenue, 1870, Department I, Rules 30 and 51.

The plaintiff, a co-sharer in the village of Deobarampur, sued for pre-emption of certain land, being 'resumed revenue-free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*kissadar*) is bent upon selling or mortgaging his right (*haqqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it: after that any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it then a stranger may take it.

Held that under the circumstances of the case the plaintiff had no right of pre-emption in respect of the land claimed by him, the vendor not being, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the resumed *mudfi*.

THE facts of this case sufficiently appear from the judgment of Knox, J.

Munshi Ram Prasad for the appellant.

Pandit Sundar Lal for the respondent.

KNOX, J.—The ground taken in the memorandum of appeal is that the record of rights has been misconstrued by the lower appellate Court, and that on a true construction of the record the respondent has no right to pre-empt and his suit should have been dismissed. The respondent was plaintiff in the Court of first instance. The suit he brought was to enforce a right of pre-emption under this same record of rights in respect of a portion of land known and styled in the village papers as "*resumed revenue-free land* of mauza Deobarampur." The respondent was one of those persons commonly known as *co-sharers* in the village of Deobarampur. In this village, besides the ordinary co-sharers, there were persons who were proprietors of land which had once been recorded as revenue-free, but had, before the present suit had been brought, been assessed to

* First Appeal No. 142 of 1894 from an order of Maulvi Muhammad Anwar Husen, Subordinate Judge of Farakhabad, dated the 4th September 1894.

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Government revenue. There were in the village also other persons who possessed proprietary interests of other kinds, but with them we are not concerned. The portion of land which forms the subject matter of this suit was a portion of the land formerly rent-free, but now assessed to Government revenue. The respondent in his plaint distinctly bases his right of pre-emption upon the clause relating to pre-emption as recorded in the village record of rights. That clause runs as follows:—"When any co-sharer (*hissadar*) is bent on selling or mortgaging his right (*hagqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it: after that any other person who is interested (*shuriq*) in the village, rank by rank, can take it. If no person interested in the village takes it then a stranger may take it." The lower appellate Court inclining to the view that the respondent and the vendor were sharers in one and the same *mahil* of the village, and that respondent was entitled to pre-empt and had a preferential right of purchase as against the appellant, who is admittedly a stranger, remanded the case to the Court of first instance for trial of the remaining issues. The Court of first instance had held a contrary view, and without determining the other questions in issue had dismissed the suit on this preliminary point. Hence the question which we have to determine in the present appeal is, whether the clause above quoted from the village record of rights does or does not confer on the respondent the right of pre-emption over that portion of the revenue-free grant subsequently assessed to revenue which is the subject-matter of this litigation. The case for both the appellant and the respondent was argued with great ability, and it was contended with much force on behalf of the respondent that, although the vendor was proprietor of a plot only of the resumed revenue-free land, he was still one of those persons termed in the record of rights a sharer (*hissadar*). In support of this contention our notice was directed to s. 62 of Act No. XIX of 1873; to the rules of the Board of Revenue, edition 1876, Department I, page 10, and especially to rules 30 and 51. We were also referred to the precedent of *Inayat Husain v. Amin-ud-din Akmad* (1), *Safdar Ali v. Dost Muhammad* (2) and the Full

(1) Weekly Notes, 1888, p. 182.

(2) Weekly Notes, 1890, p. 117.

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Bench ruling of *Niamat Ali v. Asmat Bibi* (1). The last of these rulings deals with the case of a person who was admittedly a co-sharer in the ordinary sense of the term. In *Safdar Ali v. Dost Muhammad* the case again was that of a co-sharer in the *mahál*. In both cases the dispute did not turn, as in the present case, upon whether a person who is only a proprietor of a portion of land and not one of the general proprietary body of a *mahál* can be rightly termed a shareholder in the *mahál*. The case of *Inayat Husain v. Amin-ud-din Ahmad* turned upon the interpretation to be given to the word *sharik*. On the other side we were referred to a passage in the petition for partition which had been put in by the predecessor in interest of the present respondent, and to a second passage in the partition proceedings. In both of these the predecessor in interest of the respondent distinctly sets out that neither she, styling herself *hissadar* (or sharer), nor any of the other sharers had any concern with the plot in which the subject-matter of this suit is situate. It was also pointed out to us that both in s. 62 of Act No. XIX of 1873 and in rule 51 of the rules of the Board of Revenue a separate place is assigned in the record of rights to the co-sharers distinct from that assigned to all persons occupying portions of the land in the village or in possession of any heritable or transferable interest in such land.

The particular portion of the record of rights which recites the custom regarding pre-emption finds place only in the chapter relating to the rights of sharers amongst themselves founded on custom or agreement. It is not to be found in that portion which relates to other persons. It is true that the rules contained in the circular of the Board of Revenue to which our notice was directed are rules for the guidance of Settlement Officers prescribed under Act. No. XIX of 1873, and that the village record of rights with which we are concerned bears date 1870, but the exact similarity in the heading to Chapter II of the document with that contained in the circular of the Board of Revenue shows that there must have been in existence some similar circular upon which this record of rights

(1) I. L. R., 7 All. 626.

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was framed. Looking therefore to the place in this record of rights in which the rule regarding pre-emption is to be found, I, with considerable hesitation, come to the conclusion that the persons only to whom it is intended to apply are those who are known and were known in the village as co-sharers in the ordinary language of the day, and that it was understood in the village that those who held any portion of the once revenue-free and subsequently assessed lands were in no way concerned with it, and that the rule or custom of pre-emption was not a rule or custom relating to them. The right of pre-emption not being an ordinary right, but one for which express provision must be found, I come to the conclusion that in this case and under the special circumstances the respondent has not made out his claim to pre-empt and that the Court of first instance was right in dismissing his suit.

AIKMAN, J.—I concur with my brother Knox in thinking that this appeal must succeed. The plaintiff came into Court asserting a right to pre-empt, based on a clause in the *wajib-ul-arz* of the village, and the only question we have to decide in this appeal is whether the *wajib-ul-arz* gives the plaintiff the right he claims or not. The *wajib-ul-arz* is drawn up in four chapters. We have only to consider the second and third of those chapters. The second deals with the rights of sharers among themselves; the third deals with the rights of subordinate holders. It is in Chapter II that the clause on which the plaintiff relies is to be found. The sale which gave rise to this suit was one by which a subordinate holder, who comes under Chapter III, conveyed his property to the respondent before us. I think it is clear that the meaning of the framers of the *wajib-ul-arz* was to distinguish subordinate holders from co-sharers proper. No right of pre-emption is expressly given when a sale is made by such subordinate holders. It is only in the case of a sale by a sharer that this right arises. In Chapter III there is a clause by which the zamindars of the village (and by zamindars, I understand the co-sharers) expressly disavow any right of interference with property such as that which formed the subject of this sale. I think for the plaintiff to endeavour to assert a right of pre-emp-

tion in respect of such property is to go in the teeth of the arrangement which was come to at the time the *wajib-ul-arz* was framed, to which the co-sharers and the subordinate holders had been signatories. Further, as has been pointed out by my brother Knox, the predecessor in title of the present plaintiff, when a partition was being carried out in 1889, repeated this disavowal of all concern with the resumed revenue-free land. For these reasons I think that the view taken by the Court of first instance was the correct one.

Per Curiam.

This appeal is decreed, the order of the lower appellate Court is set aside, and that of the Court of first instance restored with costs in all Courts.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAM DIN AND OTHERS (DEFENDANTS) v. RANG LAL SINGH (PLAINTIFF).*

Pre-emption—Limitation—Sale, with subsequent agreement for re-purchase—Mortgage by conditional sale.

On the 6th of June 1887, one R. K. sold a certain zamindari share to S. On the 18th of May 1888, B. brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888, the vendor, the vendee and the pre-emptor entered into an agreement by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June, 1891, the vendor, affecting to treat the transaction of the 6th of June 1887, as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act accompanied by payment of the price of the property into Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November, 1891, R. K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession and asking that the agreement of the 6th of July, 1888, might be considered null and void. On the 1st of September 1892, one R. S. filed a suit for pre-emption of the said property.

* Second Appeal No. 793 of 1894, from a decree of Kunwar Jwala Prasad, District Judge of Azamgarh, dated the 26th June 1894, reversing a decree of Munshi Kishan Lal, Additional Subordinate Judge of Azamgarh, dated the 20th of March 1893.

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Held that the original transaction of the 6th of June, 1887, was an out and out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by R. S. was barred by limitation.

The facts of this case are fully stated in the judgment of the Court.

Babu *Bishnu Chandar* for the appellants.

Maulvi *Muhammad Ishaq* for the respondents.

BURKITT, J.—This is an appeal in a pre-emption suit. The vendor, one Ram Khilawan, by a registered sale-deed dated the 6th of June, 1887, sold certain property to one Sheoraj Ahir. Subsequently, in May, 1888, a suit was instituted by one Bharos to pre-empt that property on the ground that the vendee was not a co-sharer. The suit was brought under the provisions of the *wajib-ul-arz* as to pre-emption. Before that suit came to a hearing in Court an agreement was entered into by the vendor, the vendee and the pre-emptor and was registered on the 6th of July, 1888. The effect of that document is that the vendee, practically admitting the pre-emption right of Bharos, agreed to hand back the property on the Puran Mashi of Jeth of any year on being repaid by either the vendor or the pre-emptor the amount he had given for it. Nothing further appears to have been done in the matter till the year 1891, when, on the 20th of June of that year, the vendor, assuming to treat the sale of 1887 as a mortgage, and after referring to the stipulation contained in the agreement of July, 1888, applied to the Court under the provisions of s. 83 of the Transfer of Property Act to permit him to deposit the mortgage money in Court on the ground that Sheoraj had refused to accept it. This application appears to have been shelved on the 3rd of August, 1891. Subsequently in November, 1891, Ram Khilawan applied for leave to withdraw the money from Court and asked that the agreement of 6th July, 1888, should be considered null and void, and stated that he had no longer any desire to interfere with Sheoraj's possession. This application of the 13th of November, 1891, is the foundation of the plaintiff's suit. In the sixth paragraph of the plaint plaintiff alleges that this

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transaction of the 13th of November, 1891, amounted to a sale and that therefore he is entitled to pre-empt. In the first Court the Subordinate Judge very properly held that the suit was barred by limitation, being of opinion that the plaintiff's pre-emptive rights were, as I understand him, in no way affected by the agreement of July, 1888, or by the application of the 13th of November 1891. The lower appellate Court disagreed with the first Court, and held that, though the sale of June, 1887, was an absolute out-and-out sale, the agreement of the 6th of July, 1888, had the effect of turning that absolute sale into a mortgage by conditional sale. He further held that "the effect of the application of the 13th of November, 1891, is that the conditional vendor relinquished his equity of redemption and made the sale absolute." He further held that, as the sale thus became absolute on the 13th of November, 1891, the plaintiff's cause of action arose on that date, and that therefore his suit was in time. I am unable to concur in any one of the conclusions at which the learned Judge arrived, excepting so far as he finds that the sale of June, 1887, was an out-and-out absolute sale. In that matter he is quite right. But the agreement dated the 6th of July, 1888, did not have, could not have, and was not intended to have, the effect of turning the absolute sale of June, 1887, into a mortgage by conditional sale. From the beginning to the end of that instrument the word "mortgage" is nowhere mentioned, and the sale of June, 1887, is described in it as an absolute sale (*bainamah la kalami*.) The matter to which the parties to that instrument agreed is no more than that if either the vendor or the pre-emptor repaid the purchase money on a fixed date to the vendee the latter would reconvey the property. In fact this document can be considered as neither more nor less than a promise by the vendee to re-sell the property on certain conditions. The sale as originally made remained untouched as an out-and-out absolute sale and the only right which the vendor or the pre-emptor acquired was a right of repurchase. The learned Judge in the Court below is quite wrong in holding that under the deed of July, 1880, the previous absolute sale became a conditional sale with power of redemption, and the vendor's statement in his petition of June, 1891, as to the sale

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having become a mortgage, and, in his petition of November, 1891, as to his relinquishment of his supposed equity of redemption are simply absurd. I concur fully with the view of the law taken by the Court of first instance and dissent *in toto* from that laid down by the District Judge. I allow this appeal. I set aside the decree of the lower appellate Court, and I restore the decree of the Court of first instance dismissing the plaintiff's claim. Defendants are entitled to their costs in all three Courts.

Appeal decreed.

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March 19.

Before Mr. Justice Burkitt.

AMJAD ALI AND OTHERS (PLAINTIFFS) v. MUSHTAQ AHMAD AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—"Stranger."

Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'shareholders.' Held, the parties being Muhammadans, that in regard to a sale of land to which this *wajib-ul-arz* applied a nephew (brother's son) of the vendee was a 'stranger' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Bhurey Mal v. Nawal Singh* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of Burkitt, J.

Mr. D. N. Banerji for the appellants.

Mr. T. Conlan and Pandit Sundar Lal for the respondents.

BURKITT, J.—This is an appeal in a pre-emption suit. One Muhammad Saddiq, a co-sharer, sold a small property to Mushtaq Ahmad and Muhammad Israil. Mushtaq Ahmad is a co-sharer in the same *thok* with the vendor. Muhammad Israil is not a co-sharer, but is the nephew of Mushtaq Ahmad and the son of Mushtaq Ahmad's brother, who is a co-sharer. The plaintiffs-appellants have instituted this suit for the purpose of acquiring by pre-emption the property sold to the vendees. The allegation on which their plaint is founded is that Muhammad Israil is a 'stranger' and that Mush-

* Second Appeal No. 744 of 1894, from a decree of H. G. Pearce, Esq., District Judge of Agra, dated the 23rd July 1894, reversing a decree of Babu Prithi Nath, Munsif of Muttra, dated the 21st October 1893.

(1) I. L. R., 4 All. 259.

taq Ahmad by joining him as a co-vendee has vitiated the sale. Such undoubtedly would be the case if Muhammad Israil be a 'stranger.' Now it is admitted that he is not a co-sharer; but it is contended that as a son of one co-sharer and the nephew of another co-sharer he cannot be considered to be a 'stranger.' In support of this plea the case of *Bhurey Mal v. Nawal Singh* (1) was cited. With great respect for the learned Judges who decided that case I must say that I am unable to follow the reasons given for the decision at which the Court arrived. It was a case in which three plaintiffs jointly claimed pre-emption. The Court of first appeal held that two of those plaintiffs were not entitled, as they were not co-sharers in the *dhok*. On second appeal to this Court it was held that the respondent, the first pre-emptor, by having joined with himself "certain members of his family who were strangers *quoad* the estate" did not thereby defeat his pre-emptive right. It is not stated how the other two plaintiffs were related to the plaintiff Nawal, or how they were members of his family (they appear to have been distant cousins), and there is nothing to show that they were members of a joint undivided Hindu family to whom the ruling in *Gandharp Singh v. Sahib Singh* (2) would apply. Unless they were such, in my opinion, the judgment in *Bhurey Mal's* case could be supported only on the fact, which does not appear to have been present to the mind of the Court, that the second and the third pre-emptors were near cousins of the deceased co-sharer Sahuria, whose property was in dispute. Under the terms of the *wajib-ul-arz* near cousins had a pre-emptive right. I cannot consider this case from Allahabad as any authority on the present question. Now in the present case the *wajib-ul-arz* gives successive pre-emptive rights, firstly, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'shareholders', and there are some other categories I need not notice. As the vendee, Muhammad Israil, is not a co-sharer and is not related to the vendor, he is not a person who, under any of the categories of the *wajib-ul-arz* cited above, could claim pre-emption. He, as a Muhammadan, is in a very different position from the son of a Hindu co-sharer, who

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(1) I. L. R., 4 All., 259.

(2) I. L. R., 7 All., 184.

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by the Hindu law acquires on his birth an equal right with his father. The son of a Muhammadan acquires no such vested right, and, even if he survive his father, the latter may during his life have made such a disposal of the estate as to bar the succession of the son. A person in such a position cannot but be considered to be 'a stranger,' inasmuch as he does not come within any of the categories provided in the *wajib-ul-arz*. I am therefore of opinion that by joining Muhammad Israil, who, though his nephew, was not a co-sharer nor a relative of the vendor, Mushtaq Ahmad vitiated the bargain, and that the plaintiffs are entitled to pre-empt. I must therefore allow this appeal. I set aside the judgment and the decree of the lower appellate Court, and, as the suit was decided by the Court below on a preliminary point, and as I have reversed its decision on that point, I remand the case to the lower appellate Court for decision on the merits. Costs to abide the result.

Appeal decreed : case remanded.

P. C.
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February
12th, 13th
and 14th.
March 30th.

PRIVY COUNCIL.

BEJAI BAHADUR SINGH (PLAINTIFF) v. BHUPINDAR BAHADUR SINGH
(DEFENDANT).

BEJAI BAHADUR SINGH (PLAINTIFF) v. KOUNSAL KISHORE
PRASAD MAL (DEFENDANT).

[On appeal from the High Court at Allahabad.]

Evidence proving title by inheritance to raj estates—Proof of pedigree—Act No. I of 1872 (Indian Evidence Act), s. 32—Estate held as separate under the Hindu Law—Widow's interest therein—Act No. XI of 1857 (Offences against the State)—Confiscation.

A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last raja in possession, who had died without male issue, but leaving a widow, and a daughter by her, both of whom died before this suit.

The respondent, who had obtained possession under a gift from the widow, denied the claimant's relationship to the raja. He also alleged that no title could have descended to the claimant from father to son, as the father's property had been confiscated on his conviction of an offence against the State, and sentence under Act XI of 1857.

Present : LORD HOBHOUSE, LORD DAVEY and SIR R. COUCH.

Held, that as the widow had taken the estate as the result of her husband's having owned it as his separate property, the respondent, whose only title was through her, had not established that a right of survivorship had accrued to the plaintiff's father on the death of the raja in 1853; therefore, there was no right of that kind which could have been confiscated by the sentence which was passed in 1862. Nor had the father any right of inheritance that could be enforced during the life of the widow, who outlived him. The separation of the estate, as held by the late raja, negatived both the confiscation and limitation.

The claimant, to prove his title, relied upon a pedigree, not stated in any document produced that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two manzas of the raj estate. The raja, called upon to answer in proceedings at settlement, had not given a direct denial to the alleged relationship.

On the contention that there were steps in the pedigree, as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements within s. 32 of the Indian Evidence Act, I of 1872, and as to which the evidence was insufficient.

Held, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates, on the widow's death; this opinion being founded on the documentary evidence.

Two consolidated appeals from two decrees (19th July 1889) of the High Court reversing a decree (12th November 1887) of the District Judge of Mirzapur.

These were appeals from decrees passed on appeals separately preferred by two defendants in the same suit, which was brought on the 22nd September 1886, by the plaintiff-appellant, a zamindar of mauza Ramgarh, pargana Bejaigarh, against the respondent, with other defendants, for possession of the estates of the Bejaigarh Raj, viz., villages in the districts of Mirzapur and Shahabad, valued at Rs. 1,25,755, with movables valued at over Rs. 75,000, and mesne profits amounting to Rs. 28,060. The last raja in possession was Ram Saran Sahai, who died on the 8th December 1853, leaving one daughter, and a widow, but no son. The widow, Rani Pirthiraj Kuvar, succeeded for her life, and died on the 19th April 1886. On the 28th April 1857, she made a deed of gift purporting to transfer the greater part of the raj estates to her daughter Radhe Prasad,

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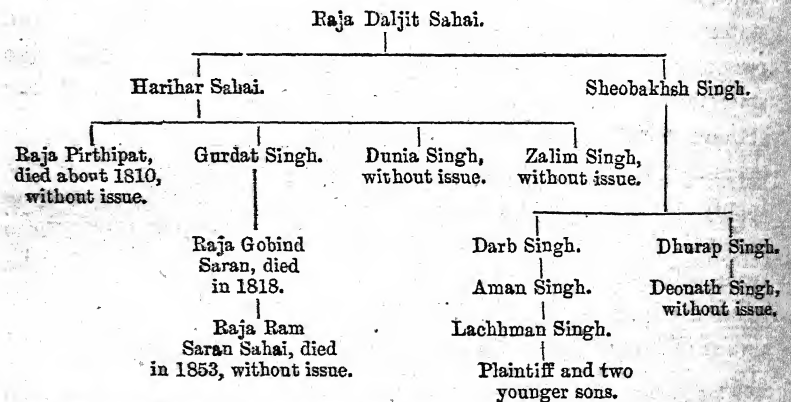
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who died in April 1859, and on the daughter's death the estates came into the possession of her husband, Babu Brijendar Bahadur. He died on the 4th August 1879, without issue, and his surviving widow and the Rani Pirthiraj Kuar executed deeds purporting to transfer all their rights in the raj estates to Bhupindar Bahadur Singh, Raja of Kantit, who was recorded as proprietor in the Collectorate books. This was the principal defendant in this suit, and with him was joined his sister's son, Kishore Prasad Mal, a minor, sued through his father. Other defendants were joined on Bhupindar's statement that they were in possession of part of the raj estates under grants from the widow.

As to some of these the plaintiff withdrew his claim, and the rest made no defence.

The plaintiff alleged that the plaintiff was heir to the raj estates as the nearest collateral relation of the last male owner, setting forth the following pedigree :—



Bhupindar Bahadur, whose nephew made substantially the same defence, defended the possession given to him by the Rani Pirthiraj Kuar. He denied that the plaintiff was descended from the same common ancestor with Raja Ram Saran Sahai. He stated the conviction of, and the sentence upon, Lachhman Singh, father of the plaintiff, by the Sessions Judge of Mirzapur on the 5th May 1862, under Act XI of 1857 (*offences against the State*), in order to show

that the plaintiff could not inherit through his father and that he had no right to sue. The sentence was of imprisonment for five years, during which the prisoner died, with confiscation of all his property. Limitation under Act XIV of 1859, section 1, sub-section 12, was also alleged, the twelve years, if commencing in 1854, having expired in the widow's time.

But the principal question in the appeal was whether the plaintiff's relationship to the raja had been rightly held not to have been established. The High Court had decided the appeals upon no other point. All the three questions, raised by the defence, were, however, decided on the present appeal.

The provisions of the Indian Evidence Act, I of 1872, referred to in the case, as to what statements of persons not present, may be proved by others, as relevant in proof of relationship, are given in section 32, to the following effect:—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be called as a witness, are themselves relevant facts, when (cl. 5) the statement relates to the existence of any relationship between persons as to whose relationship he who is said to have made the statement had special means of knowledge, and when (cl. 6) the statement relates to relationship between persons deceased, and is made in a will or deed, about the affairs of the family, or in any family pedigree, or upon any thing on which such statements are usually made. In all cases such statements must have been made before the question in dispute was raised. By section 50, the opinion expressed by the conduct of any person who has special means of knowledge is a relevant fact upon a question of relationship.

These sections and clauses were thus referred to in the judgment of the High Court:—"For the purposes of our Indian Courts this is the extent to which hearsay evidence with regard to relationship is admissible, and it may be summarized shortly under three heads—
" (1) statements made orally or in writing by persons deceased (&c.)
" having special knowledge *ante litem motam*; (2) statements in
" writing as to relationship between persons deceased, in wills or deeds

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"relating to the affairs of the family to which they belonged, or on
"a tombstone or other thing on which such statements are usually
"made *ante litem motam*; (3) opinion shown by conduct as to the
"existence of a relationship by a person who had special means of
"knowledge."

The suit was heard by the District Judge, Mr. W. T. Martin. The first issue was whether the plaintiff belonged to the family of Raja Ram Saran Sahai, and was his heir, and whether he was entitled to sue for the inheritance. The District Judge referred to the history of the Bejaigarh Raj, as contained in the printed "Duncan Records," Vol. I, p. 173; Wynyard's Settlement Report, 1843; Roberts' Settlement Report, 31st July 1847. Of these he took judicial notice under sec. 57 of the Evidence Act, I of 1872, as they were books, or documents, on matters of public history, and all of them had been compiled before the plaintiff's claim was first made. He considered that the plaintiff's chief support was the settlement proceeding and order of Mr. Roberts, dated the 9th May 1851, with other petitions, and orders, forming part of the documentary evidence. These fully appear in their Lordships' judgment on this appeal. His translation of the raja's answer in the proceedings in 1851, when called upon to answer by the Settlement Officer, did not agree as to the words—" *upar deorhi murisan kamare rakhte the* "—spoken of Babu Darb Singh, and Babu Dharap Singh by the raja, with that of the official translator in the High Court.

As to the alleged confiscation, the Judge found that, as Raja Ram Singh was in separate possession of the raj property, and his widow took a life-estate therein, according to the ordinary rules of the Hindu law, any rights, which the claimant's father had at the date of his conviction, being merely of an expectant, and not of an actual, character, were not affected by the forfeiture ordered under Act XI of 1857. On the question of limitation, proceeding upon the same view as to the right of Rani Pirthiraj to take an estate for life, the Judge held that neither she, as against her husband's collateral relations, nor Babu Brijendar Bahadur, as against her, had acquired any title by adverse possession.

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Making a summary of all the evidence, on the issue as to the proof of the claimant's relationship, the District Judge said :—

"To sum up the evidence, documentary and oral, on the first issue : defendant's counsel laid great stress on the ruling in *Kedar-nath Doss v. Protob Chunder Doss* (1), which lays down the rule that 'where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages, and one most important stage is of course the common ancestor himself.' Well, there is no question in this case that plaintiff has alleged his title as required by this ruling, for he sets forth his genealogy, step by step, from the common ancestor, Raja Daljit Singh. The proof consists in (1) the admission of plaintiff's relationship by the last raja in 1850 implied by—

"(a) his not denying the relationship, but making baseless insinuations merely, in respect of it;

"(b) his admitting that plaintiff's family received maintenance from the raj;

"(c) his setting up a baseless plea to account for plaintiff's possession of certain villages.

"(2) In the oral evidence which proves that the Bamangaon branch of the raja's family is the nearest relation to it, and plaintiff is the head of that branch, and that before her death the last raja's widow recognized plaintiff as heir to the raj.

"Accordingly, on the first issue, I find that plaintiff does belong to the family of Raja Ram Saran Singh and is his heir, and, as such, is entitled to sue."

The claim, with the exception of six mauzas, was decreed.

Each of the two present respondents filed a separate appeal to the High Court from this judgment. A Division Bench (STRAIGHT, J., and BRODHURST, J.) allowed the appeal, and dismissed the plaintiff's suit. They referred to the burden being on him to prove his pedigree. After a full examination of the evidence on which the

(1) I. L. R., 6 Calc., 626.

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decree of the first Court was based, the conclusion at which they arrived was thus expressed :—

“The matter therefore stands thus, that the plaintiff has produced no evidence of the statements of deceased persons as to his relationship through Sheobakhs Singh with Raja Daljit Singh, who had special means of knowledge of such relation and made them before the question now in controversy arose. He has brought forward no pedigree or other document relating to the affairs of the family showing the relationship he asserts between the deceased members of his branch and the deceased members of Raja Ram Saran Sahai's branch prepared before the question now in controversy arose. He has given some evidence of the opinion expressed by conduct as to the existence of the relationship alleged on the part of Raja Gobind Saran Sahai in making the allowances to the ancestors of the plaintiff, of Raja Ram Saran Sahai in his treatment of the plaintiff's father and of the Rani Pirthiraj in her treatment of the plaintiff, which, for the reasons I have stated, appears to me of no substantial value, and the statements of the four witnesses, Deonath, Sheo Saran, Bhola and Indarjit as to the status of the plaintiff. I am unable to hold that upon these materials the plaintiff has satisfied the onus that is upon him or that he has forged the connecting link in the chain which divides Darb and Dhurap from Raja Daljit Singh. I have most anxiously and earnestly considered all the evidence as well as the able arguments of the learned pleader for the respondent as well as the judgment of the Court below, but I cannot say that there is enough to warrant me in holding that the plaintiff has made out his title by proof of which alone he can succeed. It is true that the pedigree on which he relies has been asserted since 1850 down to the present time by the father of the plaintiff first, and now by the plaintiff; but it has always in my opinion been as distinctly denied by Raja Ram Saran and his Rani after him, except in the case of the latter within a few months of her death, and possession was obtained and maintained over the whole riasat despite it. In 1850 Raja Ram Saran Sahai was a man in middle life with no child, except a daughter, and I cannot under-

stand why, if Lachhman Singh were the next heir to the raj, and he had been, as he apparently was, till the proceedings in the Revenue Court, on good terms with him, the raja should have spoken of him and his ancestors as he did. It is also strange, if Lachhman Singh held the status he asserted, he should have been content with the very trifling allowance derivable from the income of the two villages Bamangaon and Souli, which produced a babuana relatively insignificant and out of all proportion to the income of the raja and his position as a cadet of the family. Again, taking the case of Lachhman Singh as he put it in 1850, 1854 and 1862, if it meant anything, it was that the raj property was ancestral and joint, but impartible; that only one person succeeded to the gaddi of the raj; that the younger brothers were called Babus and received a proportionate share of the ancestral raj in ilakas; and that these persons succeeded to the gaddi in the event of the raja dying without male issue; or, in other words, that Lachhman Singh on the death of Ram Saran Singh was entitled to the gaddi and the riasat then and there. It was not suggested that there was any right by custom of the family for females to succeed. What can be thought of his conduct in allowing the rani to obtain possession of the whole estate and to hold it for eleven years before he took any steps to assert his rights or made any effort to obtain an increased babuana? It certainly is a strong indication to my mind that, so far as Lachhman Singh was concerned, he knew he had no proof of the relationship he asserted, which would certainly, if it existed, have been more readily procurable nearly five and thirty years ago than now. So, again, from 1865 to the institution of the present suit, the plaintiff himself made no move, and it is only when financed for the purpose that he comes in with this litigation upon allegations that are altogether at variance with those formerly made, to which I have referred.

"Upon full consideration of all the circumstances, and in difference with the view of the learned Judge, I find that the plaintiff has not made out that he belongs to the family of Raja Ram Saran Sahai, the last owner, or that he is his heir and so entitled to main-

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tain this suit. This finding disposes of the appeal and it is unnecessary to discuss the question of limitation or confiscation. I decree the appeal with costs, and, reversing the decree of the court below, dismiss the plaintiff's suit with costs."

On the plaintiff's appeal from the judgment in favour of the two defendants—

Mr. J. D. Mayne and Mr. W. A. Raikes for the appellant argued that the decision of the first court was right, and should have been upheld. The evidence on the record showed that the claimant was the nearest collateral relation of the late raja, and, therefore, heir to the raj estates. The respondent, Bhupindar Bahadur Singh, only claimed in virtue of a gift from the Rani Pirthiraj Kuvar, whose title was but that of a widow, ending with her life. The qualification of the widow's estate necessarily attached to it, and there was no reason why she should have obtained an absolute interest. She obtained no greater interest than any widow succeeding under the Hindu law. The ascertainment of heirs to take on the death of an owner was a question substantially depending on the status of that owner; *The Collector of Masulipatam v. Cavali Vencata Narrainapah* (1). Thus, the appellant's case was that by Hindu law the successor of the last raja, who died in 1853, was, upon the death of his widow, the nearest male descendant from the common ancestor of that descendant and the raja.

The alleged confiscation under Act XI of 1857 of the estate, as if it had been in the possession of the claimant's father, never took place, inasmuch as the father had no title to the estate now claimed, or any property on it, upon which the sentence could operate in 1862. But setting this and limitation aside, this question here was mainly one of fact, and was whether the claimant had been proved to have been a descendant from Raja Daljit Sahai. From the younger son of this man the plaintiff alleged his descent, and in this was supported by four witnesses, members of the family; with regard to the difficulty of getting witnesses who had heard statements made by those with means of knowledge of descents which

(1) 8 Moo., I. A., 500.

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went back to the beginning of the century, this was the best evidence that could have been given. Two other witnesses, one of whom was a companion of the late raja, and the other a kanungo of the parganas in which the property was, gave evidence to the same effect. Others supported the testimony as to the treatment of Lachhman by the late raja. The documentary evidence was more important. In reference to the raja's answer having stated that the Babus, Darb Singh and Dhurap Singh, were "doorkeepers," in the sense of servants, the real meaning was that they were "upon the threshold," in the sense of being dependent on the raja's allowance, which was strictly the fact, or, as expressed by the first court, "just where poor relations would be." Had they been no relations at all, the raja would have said so.

The High Court appeared to have considered it necessary that each step in the plaintiff's pedigree should be proved in the manner described in the Evidence Act, I of 1872, section 32; but that definition of admissible hearsay evidence of pedigree did not apply to exclude the legitimate inferences that might be drawn from the documentary and general evidence in a case bearing on a pedigree. It would be plainly impossible to go far back if the proof of statements of persons who knew the progenitors and their relations when alive were required to prove every step.

Due effect had not been given to the repeated production of the same genealogy long before the controversy in the present suit, and to the absence of any direct denial by the raja of the relationship between him and Lachhman.

Mr. R. B. Finlay, Q. C., Mr J. H. A. Branson and Mr. G. E. A. Ross for the respondent, Bhupindar Bahadur Singh, contended that there was no sufficient evidence to establish the relationship of the plaintiff to the last raja, Ram Saran Sahai, the burden of proof being upon him to establish that before the title of the defendant in possession could be called in question. The alleged relationship did not rest upon family documents and the non-production of the written pedigree had been rightly treated by the High Court as of important effect. A question arose whether the

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evidence of the only four witnesses to whom, of all the sixteen witnesses for the plaintiff, the District Judge had given credit, was admissible within the Indian Evidence Act, I of 1872. There was a doubt whether the statements reported as having been made were relevant to prove the pedigree, especially in reference to the link which consisted in connecting Sheo Bakhsh Singh with Raja Daljit Sahai as his younger son. The witnesses did not speak as proving statements of deceased persons who had special means of knowledge. They spoke as persons deriving their information from a pedigree in writing which they had seen. Reference was made in connection with the proof of pedigree according to the law of evidence in England, to *Davies v. Lowndes* (1). In the Indian Evidence Act, I of 1872, ss. 32, 50 and 158 were referred to and compared with the above.

The non-production of the written family pedigree, referred to as having existed, gave rise to the doubt whether it might not have been kept back because it would have contraverted the statements of the witnesses, rather than have supported them. The documentary evidence, such as had been produced, was rather matter of corroboration than of independent proof. It had been inferred that the Raja Ram Saran Sahai admitted, by not denying, that the appellant's father was related to him in the manner alleged in the plaint. This was hardly sufficient ground for the inference that he admitted the degree of relationship, and the evidence had failed to establish it.

Mr. J. D. Mayne replied.

Their Lordships' judgment was, afterwards, on the 30th March, delivered by Sir R. COUCH :—

The appellant in this case brought a suit in the court of the Subordinate Judge of Mirzapur against the respondents and others to recover possession of a raj and large estates, the greater part of which are situate in pargana Bejaigarh, zila Mirzapur. The suit was tried by the District Judge, who decided it in the appel-

(1) 7 Scott, N. R., Com. P., 141.

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lant's favour and gave him a decree for possession of the property claimed, except six mauzas, against the respondents. They separately appealed to the High Court at Allahabad, which Court on the 19th July 1889 reversed the decree of the District Judge and dismissed the suit. The appellant's case is that Raja Ram Saran Sahai, who was possessed of the property, was the lineal descendant of Raja Harhar, or Harihar, Sahai, the son of Raja Daljit Sahai, who died between 1781 and 1790; that Raja Ram Saran Sahai, who died on the 8th December 1853, left a widow, Rani Pirthiraj Kuar, and a daughter, Radhe Prasad Kuar; that the appellant is the eldest of the three sons of Babu Lachhman Saran Singh, the lineal descendant of Babu Sheo Bakhsh Singh, the younger son of Raja Daljit Sahai; and that Rani Pirthiraj Kuar died on the 19th April 1886. The appellant filed his plaint on the 23rd September 1886. The respondents, who were in possession, appear to have obtained it in the following manner :—Rani Pirthiraj Kuar, having taken possession of the property after the death of her husband on the 28th April 1857, made deeds of gift of parts of it in favour of her daughter Radhe Prasad Kuar. She died on the 13th April 1859, and her husband, Babu Brijendar Bahadur, was, with the consent of Rani Pirthiraj Kuar, recorded as zamindar and proprietor of the property, which was the subject of the deed of gift of the 28th April 1857. On the 15th January 1872, Rani Pirthiraj Kuar executed a deed of gift of the whole of her property, with the exception of Taluka Silhat, in favour of Babu Brijendar Bahadur. He died on the 4th August 1879 leaving no issue, and the name of Musammat Dharamraj, his widow, was recorded in the revenue papers. On the 21st November 1879, she and Rani Pirthiraj Kuar, by a deed of gift and agreement gave and assigned to the first respondent, the nephew of Brijendar, all their interests in the estates belonging to the Raj of Bejaigarh, and he was put into possession and recorded as proprietor of them with the assent of Rani Pirthiraj Kuar.

In his written statement the first respondent denied that the appellant belonged to the family of Raja Ram Saran Singh.

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He also alleged that Lachhman Singh had been convicted of offences under Act XXV of 1857 (a mistake for Act XI of 1857); that his whole property and rights were forfeited to the Government; and therefore that the appellant had no right to sue. He also relied upon the law of limitation. The defence of the second respondent was in substance the same.

The appellant's evidence was both documentary and oral. It will be seen hereafter that the latter is of little value. In a proceeding recorded by the Settlement Officer and Deputy Collector of the Mirzapur district on the 9th May 1851, the question being who should be recorded in the Collectorate as proprietor of two mauzas, Bamangaon Sindwari and Soli, tappa Silbat, pargana Bejaigarh, it appears that Lachhman Singh, the appellant's father, presented a petition to the effect that the mauzas had been "from the time of Raja Gobind Saran Sahai" (the father of Raja Ram Saran Sahai) "in the possession of the applicant's ancestors and the applicant himself, without payment of revenue, in this manner, that Raja Daljit Sahai had two sons (1) Raja Harhar Sahai and (2) Babu Sheo Bakhsh Singh. Again, Raja Harhar Sahai had four sons, *viz.*, (1) Raja Pirthipat, (2) Babu Dunya Singh, (3) Babu Gurdatt Singh and (4) Zalim Singh. Babu Sheo Bakhsh Singh had two sons, (1) Babu Darb Singh and (2) Babu Dhurab Singh. Babu Dhurab Singh had a son, Babu Deonath Singh, and Babu Darb Singh had Babu Aman Singh, the father of the applicant. Babu Deonath Singh died childless. His widow, Bahoria Jawahir Kuar, is his heir. She is alive. Raja Gobind Saran Sahai in his lifetime granted the aforesaid villages revenue free to Babu Darb Singh and Babu Dhurab Singh, the applicant's ancestors, for their maintenance. From that time the applicant's ancestors, and after them the applicant, have as usual been in zamindari possession of the said villages together with all the mal and sair items without paying any Government revenue. But in the public record the name of Raja Ram Saran Sahai is entered in the column of lambardar." It was ordered that the applicant should produce his evidence, and that the raja's mukhtar should file his reply and adduce his evidence, and

that the kanungo be called upon to submit a report. On the 2nd January 1851 the raja by his mukhtar filed his reply. It is as follows:—

"The said applicant, who has no complete title-deed, calls himself a zamindár, and says that he never paid the revenue of the villages Bamangaon and Soli, and that he has been long in possession. But the fact is that the said villages constitute the ancestral zamindari of the petitioner under a decree of the Civil Court, and that he has been paying the Government revenue from year to year to the Collector, obtaining receipts and discharges from him. Formerly, Babu Darb Singh and Babu Dhurab Singh were the doorkeepers of the petitioner's ancestors, and that they therefore, having built a house at mauza Bamangaon, took up their residence in it, and made an application for the lease of those villages. Accordingly Raja Gobind Saran Sahai, the petitioner's ancestor, made over the village Bamangaon to Babu Darb Singh, at a jama of Rs. 55, and mauza Soli to Babu Dhurab Singh, at a jama of Rs. 35, without executing any deed. These persons continued to pay the above-mentioned jamas into the petitioner's office during their lifetime. Babu Darb Singh used to be paid a maintenance allowance of Rs. 46 per annum, and Babu Dhurab Singh of Rs. 30 per annum, from the petitioner's office, and both these persons served the raj and the gaddi throughout their lives. But since 1250 Fasli the applicant, at the instigation of the mischiefmakers in the pargana, would neither pay the revenue nor perform the services rendered by his ancestor. Under these circumstances the villages should be resumed by reason of the revenue remaining unpaid. The applicant's allegation of maintenance allowance is wholly false. If the applicant's ancestor was an own brother of Raja Harihar Sahai, he should produce a grant made by that raja, but he had no connection with the petitioner's ancestor. If the ancestor of the applicant considered himself to be an equal or brother, he should have asserted his claim in the court when a suit was brought by the petitioner's ancestor. Babu Dhurab Singh died childless, and the applicant has nothing to do with mauza Soli. As regards the arrears of revenue relief will be sought from the court. The revenue not having been remitted by the Government to the petitioner, he could not absolve others from payment thereof. This is a matter which is to be taken into consideration by the court.

This is the official translation of the document. The District Judge in his judgment has given his own translation, in which instead of "were the doorkeepers of the petitioner's ancestors" it is "used to live at the threshold of petitioner's ancestors." The latter translation seems rather to show that "doorkeeper" should not be taken to mean merely a servant. This proceeding appears to their Lordships to be important evidence. There is a clear statement by Lachhman of the pedigree now relied upon when there was no question as to the succession to the raj. The reply of the

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raja is not such as might be expected if Darb Singh and Dhurab Singh were not relations, but were only servants. The denial of the appellant's ancestor being a brother of Raja Harihar Sahai is argumentative rather than direct. There was no occasion to produce a grant to prove it or to have asserted the claim before in court. The order of the Settlement Officer is not material to the present question. It was that the petitioner's ancestors held the villages revenue free.

On the 7th April 1854 a proceeding relating to mutation of names by inheritance was recorded by the Collector of Mirzapur. It states that a petition of the Tahsildar of Shahganj, dated the 10th December 1853, was received, containing information of the death of Raja Ram Saran Sahai, the raja of pargana Bejaigarh; that the kanungo of the pargana also submitted a report on the 14th of that month stating that the raja died on the 8th December 1853, leaving Rani Aprup Kuar, his mother, aged 60 years, Rani Pirthiraj Kuar, widow, aged 40 years, and Babui Radhe Prasad Kuar, daughter, aged 11 years, as his heirs; and that besides these persons Babu Lachhman Saran Singh was also a near heir. He (Lachhman), the report says, writes "that Raja Daljit Singh had two sons, Raja Harihar Sahai and Babu Sheo Bakhsh Singh; that Raja Harihar Sahai had four sons, Raja Pirthipat, Babu Duniapat, Babu Gurdatt Singh, and Babu Zalim Singh; that Raja Pirthipat, Babu Duniapat, and Babu Zalim Singh had no children; that Babu Gurdatt Singh's son was Raja Gobind Saran Sahai, whose son was Raja Ram Saran Sahai; and Babu Sheo Bakhsh Singh's sons were Babu Darb Singh and Dhurab Singh; that the last-named person died childless; and that Babu Darb Singh's son was Babu Aman Singh, whose son is Babu Lachhman Saran Singh."

It is then stated in the record of the proceeding that the kanungo was ordered to furnish a report as to whether the ancestor of Babu Lachhman Saran Singh used to get any maintenance allowance as brother of the raja from this estate, and also to state who then managed the estate of the deceased raja and paid the Government revenue; that afterwards Rani Pirthiraj Kuar,

zamindár, filed a petition, to the effect that she had succeeded as heiress to all the property left by her deceased husband, and she prayed that her name should be entered in the official papers by expungement of that of the deceased.

It is to be observed here that the widow could only be the heiress of her husband if he was separate in estate from the other branch of the family. Her claim to be the heiress may reasonably be taken to mean that he was separate in estate. It would be evidence against her, and is also evidence against the first respondent, who came into possession by virtue of her gift.

The record states that the report of the kanungo was to the effect that the ancestors of Batu Lachhman Saran Singh received only mauza Bamangaon and Soli as a provision for their maintenance from the raja as bila-den (or rent-free bhuwad) allowance to a brother, and that these villages were still held in lieu of maintenance; and that the estate of the deceased raja was entirely managed by Rani Pirthiraj Kuar, and the revenue paid by her. The record then sets forth a petition of Lachhman to the effect that he and the raja "were cousins, the descendants of a common grandfather;" that Raja Ram Saran Sahai had granted the villages Bamangaon and Soli "as a provision called bhuwad for his necessary expenses;" and that under Regulation X of 1793 a woman was prohibited from engaging for payment of the Government revenue, "and being a sarbarakar (manager)," and therefore it was but just that the management of the official matters should be entrusted to him. He seems not to have disputed that the widow was the immediate heir for her life. Rani Pirthiraj Kuar filed a reply to this petition to the effect that "Raja Gobind Saran Sahai was the only son of his father, and he had neither a brother nor a first cousin; then how can the objector be a cousin (brother amzad) of the deceased raja, and how can he have right or title to the estate?" This is evasive. It gives the literal meaning to "grandfather," which could not have been intended, as in the pedigree the common ancestor was more remote. The order was that the name of Rani Pirthiraj

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Kuar should be entered as lambardár, the Collector saying :—"The objection of Babu Lachhman Saran Sahai, who urges his own right, cannot be admitted. He is three or four degrees removed from the deceased raja."

The proceeding for mutation of names was immediately followed by an application by Pirthiraj Kuar for a certificate of heirship under Act XX of 1841 to the Judge of Mirzapur. The proceeding recorded by him on the 5th May 1854 states that Pirthiraj Kuar applied as the only heir to the deceased raja, which would be true if he and Lachhman were separate in estate; that Lachhman filed his objections to the effect that the certificate of heirship was to recover debts and not to get possession of the zamíndári estate and to secure the gaddi of the raj, but that it was known to all that the objector and Raja Ram Saran Sahai "were cousins, being the descendants of a common grandfather, and that the zamíndári and the raj (estate) of Bejaigarh is a hereditary property which has not up to this day been ever partitioned (divided) according to the customs and usage of the raj. It is thus clear that after the death of Raja Ram Saran Sahai, the objector and the Rani Saheba were the only heirs to the raj and the estate, and that the Rani Saheba being a *pardah-nashin* lady, he was the only person entitled to manage the raj and the estate." The decision of the Judge was that the objections of Lachhman could not be allowed "because, according to *Macnaghten*, it is the general rule of the Benares School of Hindu law, which also applies to these parts, that when there is a separation and no son, the widow as against other heirs has a preferential right. It appears that the objector and the deceased raja were separate, because irrespective of the deposition of the witnesses of the rani-applicant, who spoke of the separation, it appears from the proceedings of the Revenue Court, dated 9th May 1851, the contents of which are not only admitted by the objector's witnesses, but by the objector himself, that they were separate; that is, it shows that the objector and his ancestors were in separate possession for a long time of the villages of Baman-gaon, Sayedwari and Saní Balami for their maintenance." It

was accordingly ordered that the objections of Lachhman Singh be rejected and a certificate be given to Rani Pirthiraj Kuar.

It thus appears that Rani Pirthiraj Kuar relied on the separation as entitling her to the certificate and that on that ground the decision was in her favour. This is strong evidence against the respondents of the separation. Their Lordships are of opinion that there was a separation, and this disposes of the objections of the forfeiture by Lachhman and the law of limitation. Lachhman, when he was convicted, had no property or right in the estates that could be forfeited. He could only be entitled as heir to the raja upon the death of the widow if he survived her. It is also to be observed that Pirthiraj Kuar appears in this proceeding not to have denied the relationship as she did in the previous proceeding, but only evasively.

The only question, then, is whether the evidence is sufficient to prove that the appellant was the heir of Raja Ram Saran Singh on the death of Pirthiraj Kuar. Of the appellant's witnesses the District Judge was of opinion that only four had "some claim to special means of knowledge;" that the rest had not, and therefore that their opinions were "worthless." As no written pedigree was produced, he held that their evidence, so far as it was derived from such a pedigree, was clearly inadmissible under section 59 of the Evidence Act. As to their being members of the same family, he said they were so remotely connected with the last raja's family that their opinion as to the appellant's connection, step by step, with the last raja was of little weight. He considered that the witnesses of the defendant (the respondent Bhupindar Singh), who spoke as to the raja's pedigree and asserted that Raja Daljit had but one son, Harhar, had "no special means of knowledge whatever, and their evidence on the point is worthless." The High Court agreed with the District Judge as to the oral evidence except that of the four witnesses. The learned Judges appear to have thought that the evidence derived from a pedigree not produced was admissible, because the questions-in-chief put by the plaintiff's pleader to the witnesses were not objected to. But after stating the

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evidence rather fully they said they were of opinion that as no effort was made to produce a pedigree, or account for its non-production, the evidence was worthless. Their Lordships think little, if any, weight should be given to this evidence. Their opinion on the case is founded upon documentary evidence. That appears to show that Lachhman as far back as 1851 asserted his relationship, and set out the pedigree upon which the appellant now relies. On the death of the raja in 1854, according to the report of the kanungo, Lachhman again set out his pedigree and claimed to be a near heir. This was met by the rani by the allegation that she was the heiress, and in the certificate proceedings she appears to have examined witnesses to prove separation, which would show that she was the heiress, but is consistent with the claim of Lachhman according to his pedigree. She does not appear in this proceeding to have denied his relationship, and her conduct not long before her death agrees with this; though it may perhaps be explained by her having quarrelled with the respondents.

Their Lordships have come to the conclusion that the evidence is sufficient to prove that the appellant was, on the death of Rani Pirthiraj Kuar, the heir of her husband the raja, and was entitled to the estates, of which possession was decreed to him by the District Judge; and they will humbly advise Her Majesty to affirm that decree and to reverse the decrees of the High Court, and to order the appeals to it to be dismissed with costs. The respondents will pay the costs of these appeals.

Appeal allowed.

Solicitor for the appellant—

Mr. T. C. Summerhays.

Solicitors for the respondent, Raja Bhupindar Bahadur Singh,
Messrs. Pyke and Parrott.

APPELLATE CIVIL.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

UMRAO CHAND (PETITIONER) *v.* BINDRABAN CHAND AND ANOTHER
(OBJECTORS).*

*Letters Patent, s. 10—Act No. V of 1881 (Probate and Administration Act), Ch. V—
Probate—"Order"—"Decree"—Civil Procedure Code, ss. 2, 591—Appeal.*

An appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Chapter V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the findings of fact arrived at in the judgment under appeal.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Knox J., setting aside a grant of probate made by the District Judge of Agra.

The facts of the case are thus given in the judgment under appeal:—

"This is an appeal from an order dated the 7th March 1894, passed by the District Judge of Agra on an application made to him by one Umrao Chand for probate of the will of Ghansham Chand, or for letters of administration with a copy of the will annexed. The case was a contentious case: therefore, as provided by s. 83 of Act No. V of 1881, the proceedings before the Judge had to take the form as nearly as might be of a suit according to the provisions of the Code of Civil Procedure. The petitioner for probate had to take the place of plaintiff and the persons who opposed the grant of probate had to appear as defendants. The burden of proving that the will was such a will that probate could be granted lay upon the plaintiff, in other words, upon the applicant for probate. He had to prove, to the satisfaction of the Judge, that the writing for the probate of which he asked was the last will and testament of Ghansham Chand and that it had been duly executed. In support of these facts three witnesses were produced, and

* Appeal No. I of 1895, under s. 10 of the Letters Patent from a judgment of Knox, J., dated the 26th November 1894.

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the only comment that the learned Judge makes upon their evidence is as follows :—‘The genuineness of Ghansham Chand’s will and the *mala fides* of the objectors are clearly shown.’

“It is little wonder that in the face of such a perfunctory judgment the learned counsel who appeared for the appellants before me has objected that there has been virtually no trial of the case in the Court below. The objection is certainly a sound one and entails upon me the necessity of doing what the lower Court has left undone, *i.e.*, of weighing and examining the evidence which has been put forward for grant of probate.”

The Court then proceeded to deal with the evidence tendered in the Court below and came to the conclusion that it was not sufficient to warrant the granting of probate of the will of Ghansham Chand, and accordingly set aside the order of the District Judge.

The applicant preferred an appeal under s. 10 of the Letters Patent.

Mr. D. N. Banerji for the appellant.

The Hon’ble Mr. Colvin and Munshi Ram Prasad for the respondents.

EDGE, C. J., and BANERJI, J.—This is an appeal brought under s. 10 of the Letters Patent from the judgment or decree of our brother Knox. Our brother Knox had before him an appeal from an order made by the District Judge of Agra under Act No. V of 1881 granting probate of a will propounded before him.

A preliminary objection was taken that an appeal did not lie under s. 10 of the Letters Patent in this case. It was contended that the order of the District Judge of Agra, granting probate was not a decree, but was simply an order, to which s. 591 of Act No. XIV of 1882 applied. That contention was based on the fact that s. 86 of Act No. V of 1881 gives an appeal to the High Court from a District Judge from an order made by him by virtue of the powers conferred on him by Act No. V of 1881, and to the fact that, in that Act, the orders of the District Judge are referred to as

"orders," not as "decrees." The contention was also supported by a reference to s. 83 of Act No. V of 1881. It appears to us that, although the term used to express the operative decision of the District Judge in cases arising under Chapter V of Act No. V of 1881 is "order," still, when applying Act No. XIV of 1882, we must see whether the order of Chapter V of Act No. V of 1881 would be an order or would be a decree, as those terms are defined in s. 2 of Act No. XIV of 1882. Section 591, as was decided in Letters Patent Appeal No. 31 of 1894, in the case of *Richard Wolf v. J. E. Howard* on the 18th instant (1), must be read with s. 588, and should be construed as if the words "under this Code" were inserted between the words "by any court" and the words "in the exercise of." That being so, if the order from which the appeal was brought to this court in this case was not an order as defined by Act No. XIV of 1882, but was a decree, Chapter XLIII of Act No. XIV of 1882 would not apply to it, or to any subsequent appeal arising out of it. An order, as defined in s. 2 of Act No. XIV of 1882 means—"the formal expression of any decision of a Civil Court which is not a decree, as above defined." For present purposes a decree, as defined in that section, means—"the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the court expressing it, decides the suit or appeal."

There can be no doubt that the order of the District Judge granting probate did decide, so far as his court was concerned, not only a right to have the probate granted, but the defence which was set up to the granting of the application for the probate; consequently it must be a decree within the definition of s. 2 of Act No. XIV of 1882, and, as such, Chapter XLIII of Act No. XIV of 1882 did not apply.

It was also suggested, although the point was not pressed, that in this Letters Patent Appeal we were bound by the findings of fact of our brother Knox, and that the appeal before us could not be dealt with in the same way in which a first appeal to this Court

(1) *Supra*, p. 438.

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might be dealt with. That contention would place an appeal under s. 10 of the Letters Patent in the same position as an appeal to which Chapter XLII of Act No. XIV of 1882 applies. Chapter XLII limits the right of appeal from a decree passed in appeal by a court subordinate to the High Court, and only applies when the appeal is one from a decree passed in appeal by a court subordinate to the High Court. The appeal to this High Court having been a first appeal, and not an appeal to which Chapter XLII of Act No. XIV of 1882 applies, the parties to the appeal are entitled to question not only the law, but the findings of fact of the Judge of this court from whose judgment or decree this appeal has been brought under s. 10 of our Letters Patent. It would be otherwise if the appeal to this court had been an appeal to which Chapter XLII of Act No. XIV of 1882 applied. Then the Bench sitting in the Letters Patent appeal would be bound by the same rule which bound the single Judge from whose decree or order the appeal was brought. We hold that an appeal lay from the judgment or order of our brother Knox, and that the parties were entitled to have this Bench consider not only the law, but the evidence in the case.

[The court then proceeded to consider the case on the merits, and arriving at the same estimate of the evidence as that taken in the judgment under appeal, dismissed the appeal. The remainder of the judgment, consisting solely of a discussion of the evidence, is unnecessary for the purposes of this present report.—Ed.]

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March 23.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

IMDAD ALI (JUDGMENT-DEBTOR) v. JAGAN LAL AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Civil Procedure Code, s. 244—Objection by representative of party to the suit to the jurisdiction of the court which passed the decree.

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a

* Appeal No. 57 of 1894, under s. 10 of the Letters Patent from a judgment of Burkitt, J., dated the 8th November 1894.

decree after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

The question of the competency of the court charged with the execution of a decree to determine whether the court which passed the decree had jurisdiction to pass it, considered. *Muhammad Sulaiman Khan v. Fatima* (1) and *Haji Musa, Haji Ahmed v. Purmanand Nursey* (2) referred to.

THE facts of this case are fully stated in the judgment of the court.

Maulvi *Ghulam Muhibbullah* for the appellant.

Mr. *Roshan Lal* and Munshi *Madho Prasad* for the respondents.

EDGE, C. J., and BANERJI, J.—The respondents to this appeal under the Letters Patent brought a suit against one Muhammad Jalil and one Musammat Hamid-un-nissa for possession of certain property. Musammat Hamid-un-nissa died before the decree was made in that suit, and the decree was made as against her and Muhammad Jalil without any representative of Musammat Hamid-un-nissa being brought on the record. The decree was in favour of the plaintiffs for possession of the property in suit. After that decree was made the heir and legal representative of Musammat Hamid-un-nissa, who is the appellant here, Kazi Muhammad Imdad Ali, brought an appeal from that decree. That appeal was dismissed without costs, on the ground that Muhammad Imdad Ali had no *locus standi* to appeal, as he had not been made a party to the record of the suit. After the dismissal of that appeal the decree-holders, respondents here, presented an application to the court which had passed the decree, asking to be put in possession in execution of that decree. In that application they described Imdad Ali as the legal representative of Musammat Hamid-un-nissa, deceased. No notice was issued or given to Imdad Ali on that application for execution, and behind his back the order for execution was made. It was enforced by ousting him from possession of and putting the decree-holders in possession of the property. Subsequently Imdad Ali presented an application to the court which had executed the decree, asking the

(1) I. L. R., 11 All., 314.

(2) I. L. R., 15 Bom., 219.

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court to hold that the decree was null and void and incapable of execution, and to restore him to the possession of which he had been deprived. In that application he described himself as the heir of Hamid-un-nissa, and he alleged that the decree-holders had knowingly and intentionally omitted to make him a party to the suit after the death of Hamid-un-nissa. He described his application as one made under s. 332 of the Code of Civil Procedure. The Munsif dismissed that application, holding that the dismissal of Imdad Ali's appeal precluded him from questioning the right of the decree-holders to the decree which they had obtained.

On appeal the District Judge set aside the order of the Munsif and granted Imdad Ali's application. From that order of the District Judge an appeal was brought to this court by the decree-holders. The learned Judge, before whom that appeal came, held that as the application of Imdad Ali purported to be one under s. 332 of the Code of Civil Procedure, no appeal lay to the District Judge from the decision of the Munsif, and he set aside the order of the District Judge and restored the order of the Munsif. From that order of the Judge of this court this appeal has been brought under s. 10 of the Letters Patent.

It was contended by Mr. *Roshan Lal* for the decree-holders, respondents, that the application of Imdad Ali was in fact an application under s. 332, and consequently that Imdad Ali's sole remedy was by a suit; and he further contended that s. 244 of the Code of Civil Procedure did not apply in this case, as the decree had been fully executed.

Now it appears to us, having regard to the object of s. 244, that that section would apply as well to a dispute arising between the parties contemplated by that section, in relation to the execution of the decree after it had been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.

We think, for instance, that it was not the intention of the Legislature that a dispute between the parties to the suit, or

their representatives, as to the amount for which the decree was to be executed, should, if it arose, be decided under s. 244, and that a dispute subsequent to the execution of the decree, between those same parties, as to whether the decree had been executed for a greater amount than the decree-holder was entitled to under the decree, should not be decided under s. 244. To take an example, let us assume that the decree having been fully executed, the court, in error, proceeds to execute the decree again by handing over to the decree-holder the amount deposited in court by the judgment-debtor. We cannot conceive that it was the intention that in such case the judgment-debtor should be forced to bring a suit for the recovery of the amount so handed over in excess, and should not have his remedy under s. 244. There is no doubt that Imdad Ali described his application to the Munsif as made under s. 332 of the Code of Civil Procedure. It was, in our opinion, an application which could not succeed under s. 332 of the Code of Civil Procedure, as that section cannot apply where s. 244 applies. Section 244 applies to the representative of the party to the suit in which the decree was made. Imdad Ali was a representative of the party to the suit in which the decree was made, although that party died before the decree was made; and further, although it is not essential to our judgment in this case, there is the fact that the application for execution of the decree was made as against Imdad Ali as representative of the deceased Hamid-un-nissa. A representative of a party to a suit in which a decree has been made, when there is a dispute between him and the decree-holder as to the execution of the decree, cannot oust the jurisdiction of the court under s. 244 by making an application under s. 278 or s. 332, unless, indeed, he claims the property as trustee for a third party. The Munsif in the present case was bound by s. 244 to deal with the application in question here, no matter under what section it was headed, as an application coming under clause (c) of s. 244, and as a matter which had to be determined by an order of the court executing the decree, and not by a separate suit. The point here was that the proceedings in execution were null and

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void, and that the decree was incapable of execution, and that it had never been legally executed against Hamid-un-nissa and her estate. The question as to whether the decree is capable of execution is a question relating to the execution of decree, and, in our opinion, the very nature of the objections raised by Imdad Ali precluded any contention that the decree had been validly executed. There can be no doubt, in our opinion, that the court charged with the execution of a decree can consider the question as to whether the court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. We think that that proposition follows from the principle in *Muhammad Sul iman Khan v. Fatima* (1), and it is recognised by Farran, J., in *Haji Musa, Haji Ahmed v. Purmanand Nursey* (2). In this case the decree having been made against Hamid-un-nissa and her estate after she had died, and when no representative of hers was on the record, was, so far as her representative and her interest in the property are concerned, a void decree and incapable of execution; and it follows that the proceedings in execution of that decree, so far as Hamid-un-nissa's property was concerned, were *ultra vires* and without jurisdiction. That being so, and it being quite clear that the application of Imdad Ali, although described as made under s. 332, was one to be dealt with under s. 244, we hold that the appeal lay: and we also hold that, the order in execution being *ultra vires* and without jurisdiction, Imdad Ali was entitled to have those proceedings in execution, so far as the property of Hamid-un-nissa was concerned, set aside, and we make an order accordingly and direct that an order be made that he be put in possession. The appellant will have his costs in all courts.

Appeal decreed.

(1) I. L. R., 11 All., 314.

(2) I. L. R., 15 Bom., at p. 219.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

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April 3.

RAM RATAN AND OTHERS (DEFENDANTS) v. LALTA PRASAD (PLAINTIFF).*

Regulation No. IV of 1876 Act No. IV of 1882 (Transfer of Property Act), s. 88—Civil Procedure Code, ss. 1, 2, 19, 24—Jurisdiction—Mortgage—Mortgaged property situated partly in district of Moradabad and partly in the Tarāi—Suit for sale in Moradabad Court.

Held that the Courts of the Moradabad district had no jurisdiction to pass a decree, in a suit for sale on a mortgage, for sale of land situated in the Tarāi, to which at the time of the mortgage and of the suit thereon Regulation No. IV of 1876 applied, by reason merely of a portion of the property mortgaged being situate in the Moradabad district.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. T. Conlan and Pandit *Sundar Lal* for the appellants.

Mr. D. N. Banerji, Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand* for the respondent.

EDGE, C. J., and BANERJI, J.—The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Moradabad. It was a suit for sale under s. 88 of Act No. IV of 1882. A very small portion of the property mortgaged, *viz.*, 50 square yards, was situate in the district of Moradabad. It is said, but we need not decide the point, that those 50 yards only existed in imagination, and were entered in the bond to give the Court of Moradabad jurisdiction and to allow of registration in that district. The other portion of the property mortgaged by that bond was in the Tarāi district under the Government of the Lieutenant-Governor of these Provinces and within the district to which, at the time when the mortgage was made and this suit was brought, Regulation No. IV of 1876 applied. The Subordinate Judge passed a decree for sale, not only of the Moradabad property, but also of that portion which was in the district of the Tarāi.

The defendants who have appealed here were purchasers subsequent to the mortgage of the mortgaged property in the Tarāi

First Appeal No. 203 of 1893, from a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 22nd May 1893.

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district. The other defendants have not appealed. Pandit *Sundar Lal*, on behalf of these defendants-appellants, has contended that the Court of Moradabad had no jurisdiction to entertain the suit, so far as it related to the property in the Tarái district. He also contended that so far as the property in the Tarái district is concerned the suit is barred by twelve years' limitation by rule 3 of Chapter I of the schedule to Regulation No. IV of 1876. On the other hand Mr. *D. N. Banerji*, for the plaintiff-respondent, contended that s. 19 of Act No. XIV of 1882 gave the Court of Moradabad jurisdiction to entertain the suit as brought.

By s. 3 of Regulation No. IV of 1876 it is enacted that the Tarái district shall not be subject (a) to the jurisdiction of the Courts of civil judicature constituted by the Regulations of the Bengal Code and by the Acts passed by the Governor-General in Council.

* * * * *

(c) to the system of procedure prescribed by the said Regulations and Acts for the said Courts of civil judicature.

(d) to the civil jurisdiction of the High Court for the North-Western Provinces.

By s. 1 of Act No. XIV of 1882 the application of Act No. XIV of 1882 is excluded from the scheduled districts as defined in Act No. XIV of 1874. The Tarái district in question is one of those scheduled districts. Now the only section which could have given the Court at Moradabad jurisdiction to entertain the suit so far as it related to the property in the Tarái district, if it had not been for s. 1, was s. 19 or s. 24; but as s. 19 only applies where the immovable property is situate within the limits of different districts, we have to see whether "district" has a special meaning when used in that section. For that purpose we must turn to s. 2 of Act No. XIV of 1882, and there we find "district" defined; but that section is one of the sections which by s. 1 are excluded from consideration when dealing with a question in a scheduled district. Consequently in our opinion s. 19

could not give the Court at Moradabad any jurisdiction to entertain a suit relating to immovable property in the Taráí district.

We do not intend to decide the question of limitation, but we merely say this, that if the Court at Moradabad had jurisdiction to decree a sale of this property in the Taráí, this anomaly would arise; it might be that so far as the Court at Moradabad was concerned the limitation in that Court for a sale of property would, under art. 147 of sch. ii of Act No. XV of 1877, be sixty years, whereas if the suit had been brought in the Court of the Taráí district, the limitation would, by reason of rule 3 of Chapter I of the schedule of Regulation No. IV of 1876, be twelve years. We say we do not decide what would be the limitation applicable in the Court of Moradabad so far as it relates to the property in the Taráí. That is by no means an easy question, but we are not called on to decide it.

We decree this appeal in so far as the decree of the Court below was a decree for sale of the property in the Taráí and in so far as these appellants are concerned; and in so far as these defendants-appellants and the property in the Taráí are concerned, we dismiss the suit with costs.

Appeal decreed in part.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

IN THE MATTER OF THE PETITION OF RAHMAT-ULLAH.

Magistrate of the District, powers of—Criminal Procedure Code, s. 144—Executive powers of Magistrate—Order which might have the effect of interfering with the execution of a decree of a Civil Court.

A District Magistrate has no power either under s. 144 of the Code of Civil Procedure or in his executive capacity to make an order for the re-building of a structure on private land which has fallen into disrepair or been pulled down, neither has he power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court.

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THIS was a reference made by the Sessions Judge of Benares in respect of certain orders passed by the District Magistrate. The circumstances which gave rise to the passing of the orders in question are thus stated in the explanation tendered by the Magistrate:—

“The Lath Bhairon is a very famous place of worship for the Hindus and is one of the most sacred places in Benares *

* * * On one side of it there is a tank called Kapal Mochin which is held sacred by Hindus, and there is a house lately built for the *goschain* who lives there as permanent *pujari* and receives fees from pilgrims. Adjoining the famous Lath there is a mosque or *idgah*—an object of veneration by Muhammadans. Close to the tank and on both sides of the stairs leading to the mosque there were two dalans, which are called by the Hindus ‘dharmsalas,’ and ‘*baradaris*’ by the Muhammadans. *

* * * *

“In 1889 Nepal Nath, *goschain*, the former *pujari*, brought a suit against Haji Supan for possession of the whole of the land. He got a decree for only a small portion of the land, but not including that on which the Lath itself and the *dharmsalas* stand.

* * * *

“Last year (1894) the Muhammadans collected materials for building at the Lath. The Hindus in accordance with the old orders on the subject objected. It was then found that the *goschain* in charge had come to an agreement with the Muhammadans; the latter were to be allowed to repair their *farash* and the Hindus to build a wall round the Lath. * * * *

“At last during the rains the Muhammadans, without any orders, removed the *baradaris*, thus causing great inconvenience and general excitement amongst the Hindus. * * * *

The District Magistrate thereupon passed certain orders which may be thus summarised:—(1) The petitioner and others were ordered to rebuild at once the *baradaris* which they had dismantled; (2) Muhammadans were directed not to trespass in a certain house

regarding which a complaint had been made on behalf of the Hindus interested in the premises in question; and (3) no party, Hindu or Muhammadan, holding a decree affecting any portion of property at this place was to be permitted to execute it without report to, and permission of, the District Magistrate.

Against these orders Rahmat-ullah and others applied in revision to the Sessions Judge, who, taking the view that the orders were *ultra vires* of the Magistrate referred the case to the High Court, as stated above.

Mr. J. E. Howard and Mr. Amir-ud-din for the applicants.

Mr. E. A. Howard for the opposite parties.

The Officiating Public Prosecutor (Mr. A. H. S. Reid) for the Crown.

EDGE, C. J., BANERJI and BURKITT, JJ.—We have to consider in revision certain orders passed by the Magistrate of Benares. So far as we need refer to those orders, they were that one Rahmat-ullah should re-build two *baradaris* which, according to the order, had partly fallen in the rains, and which he had by misconception dismantled. The order directed the applicant in the proceeding in revision to re-build them on their old site, and of the same shape and stone structure as they were formerly, and directed him to begin the re-building at once. The other part of the order was that nobody, even though possessing a decree for the plot there, should act without report to, and permission of, the District Magistrate in any new way in dismantling, building, repairing, or should cut or get cut any tree from the place there without report to, or permission of, the District Magistrate. The District Magistrate's explanation of his powers was that he had got power to make these orders as an executive officer; and he also suggested that, whether he had power or not as an executive officer, they were good orders under s. 144 of Act No. X of 1882, and, as such, ought to be upheld by this court. When the matter came before us, we were anxious to ascertain whether there was any statutory authority conferring power on Magistrates to make orders such as these, and we directed notice to

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go to the Magistrate to show cause why his order should not be set aside. The Public Prosecutor has appeared here to show cause. His contention has been, as to the order to re-build, that that was an order which could lawfully be made under s. 144 of Act No. X of 1882; that it came under the words "to take certain order with certain property in his possession or under his management," that is to say in the possession, or under the management, of Rahmat-ullah. Those words are undoubtedly very wide and equally vague, but we must assume that the Legislature in using those words in the section did not intend to give a Magistrate such extraordinary powers as would enable him to order, under that section, a building which had fallen down in private grounds to be re-built by the owner of those grounds. If Mr. *Reid's* contention as to the re-building part of the order were correct, a litigant who had established his right to open windows in his house or to maintain open ancient windows in his house could be restrained for two months by a Magistrate's order under s. 144; and in certain cases; by a further order of a Local Government under that section, permanently, from availing himself of the right decreed to him by the Civil Court, and that even if the decree were a decree of the Queen in Council. We may give another illustration. A, a private person, in order to prevent his neighbour B overlooking A's premises, might put up a hoarding on his own land, and on his removing it, if B objected that the removal of the hoarding would cause annoyance to him and his family, who could be overlooked from A's ground, the Magistrate could, if Mr. *Reid's* contention is correct, make a lawful order under s. 144 ordering A to resuscitate the hoarding on his own ground, which he had pulled down. There must be a reasonable construction put on these vague words of the statute.

To refer to the other portion of the order. Mr. *Reid* at first contended that the Magistrate would have jurisdiction under s. 144 to restrain a man from executing a Civil Court decree, if he was not satisfied that the man was rightfully entitled to execute the decree in the way in which it was being executed. The execution of a Civil Court decree is provided for by the Code of Civil Procedure,

and, in our opinion, a Magistrate has no more jurisdiction to interfere with the execution of a Civil Court decree than he has to question the legality or propriety of the decree itself.

Where a Magistrate happens to be Collector, he may have to execute the decree, if execution is sought against ancestral property, but there he is a *quasi* court executing the decree; but, as Magistrate, his duty in connection with the execution of a Civil Court decree begins and ends with the rendering of necessary protection to the officers of the Civil Court lawfully executing the decree of the Civil Court, and neither he nor the Local Government, under s. 144, has any jurisdiction to make any order restraining the execution of a Civil Court decree, or threatening with a prosecution under s. 188 of the Indian Penal Code any person who attempts to execute a Civil Court decree in the particular place, without the Magistrate's permission.

The authority of every Magistrate to do any act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived either directly or indirectly from Parliament, and it is a mistake to assume that, because an officer is an executive officer or a judicial officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin, *viz.*, the Acts of Parliament.

We hold that these orders in the respects which we have mentioned were *ultra vires*, and that the Magistrate had no power or jurisdiction to make them.

In order to avoid being misunderstood, we think it right to say that it is necessary that a Magistrate should have the extensive powers which are conferred on him by s. 144 of Act No. X of 1882, and we think that as long as his order is within that section, that is, so long as he has jurisdiction under that section to make it, he should be given the widest discretion. The powers under that section are intended to be used summarily for the protection of the

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public, including private individuals, and the preservation of the peace. If this order had been one which the Magistrate had power to make under s. 144, we should have had no jurisdiction or power to interfere with it. We may say further that the Magistrate of Benares, in our opinion, acted with the very best intentions, but unfortunately he did exceed his jurisdiction.

Our order is that the orders prohibiting any persons from executing Civil Court decrees in that place and directing Rahmat-ullah to re-build the *baradari* are hereby set aside.

The proceedings which have been instituted under s. 188 of the Indian Penal Code for disobeying the orders we have set aside must be discontinued, otherwise a remedy may be sought by application to this Court.

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April 16.

APPELLATE CIVIL.

Before Mr. Justice Know and Mr. Justice Aikman.

THE ELGIN MILLS COMPANY (OPPOSITE PARTY) v. THE MUIR MILLS COMPANY (PETITIONER).*

Act No. V of 1888 (Inventions and Designs Act) ss. 4, 30—Invention—Improvement—Combination of known substances to produce a known result—Burden of proof.

Held, that a combination, effected by placing one known material side by side with another known material, not involving the exercise of any special inventive power, and ending in a result which differed from previous results only because the materials so placed produced an improved article, did not amount to an "invention" as defined by Act No. V of 1888.

Held further, that it is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed.

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Blair, J. The facts of the case are as follows:—

In the year 1890, one Clarence Noble Cline, then an employé of the Elgin Mills Company, Cawnpore, obtained under Act No. V of 1888 a patent in respect of a particular kind of tent devised by him, which he called "the native cavalry trooper's pal." In the same

* Appeal No. 80 of 1893, under s. 10 of the Letters Patent, from an order of Blair, J., dated the 27th May 1893.

year the patentee sold his patent to the proprietors of the Elgin Mills Company, Cawnpore. Thereupon the Muir Mills Company, respondents in the present appeal, applied to the High Court under s. 30 of Act No. V of 1888 for a rule calling upon the above-mentioned vendor and his vendees to show cause why it should not be declared that an exclusive privilege in respect of the tent known as the "native cavalry trooper's pal" had not been acquired under Part I of the said Act, on the grounds—“(i) that the said alleged invention was not at the date of the delivery or receipt of the application for leave to file the specification a new invention within the meaning of the said Act; (ii) that the said applicant, Clarence Noble Cline, was not the inventor thereof; and (iii) that the said Clarence Noble Cline has knowingly included in the application for leave to file the specification and in the specification, as part of his alleged invention, things which were not new and whereof he was not the inventor.” Upon this application a rule was issued as prayed, and an issue was framed by Mr. Justice Straight—“Whether the tent described in the specification was a new invention within the meaning of Act No. V of 1888.”

The rule came on for hearing before Blair, J., who found in effect that inasmuch as no single part of the patented tent was in any sense an invention, a patent could only be sustained for it as for an improvement; but that it was not such a marked deviation from previously existing tents of a similar nature as to warrant the grant of exclusive privileges in respect thereof. He accordingly made an order declaring that the defendants had not acquired any such exclusive privilege as that claimed in respect of the tent in question.

The defendants appealed.

The Hon'ble Mr. Colvin, Mr. W. K. Porter and Pandit Moti Lal for the appellant.

Mr. T. Conlan, Mr. A. S. Strachey and Mr. D. N. Banerji for the respondent.

KNOX, J.—This is an appeal under s. 10 of the Letters Patent. The Muir Mills Company, who were plaintiffs and are now respon-

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dents, prayed this Court to grant a rule under s. 30 of Act No. V of 1888, and to call upon the Elgin Mills Company, the present appellants, to show cause why the Court should not declare that an exclusive privilege in respect of a certain tent known as the "native cavalry trooper's pal" had not been acquired by the Elgin Mills Company aforesaid.

The appellants appeared and showed cause. They claimed that the tent in dispute was at the time of the delivery of the application for leave to file the specification and at the time of the receipt of such application a new invention within the meaning of Act No. V of 1888.

The finding of the Court was to the effect that the invention was not the result of such skill and ingenuity as to deserve the protection of a patent. It was held that, having regard to the common use of every single material and device used in the tent in dispute and to the way in which they had been previously used, it was not a new combination within the meaning of the law. It was neither more nor less than an aggregate of colorable deviations from perfectly well-known existing types, and in its combinations it produced no result that could be called a new result under the terms of the Patent Law. It was accordingly declared that an exclusive privilege in the invention, the property of the appellants, had not been acquired by them, and the rule granted on the application of the Muir Mills Company was made absolute.

In appeal it is contended that the tent, the subject-matter of the appeal, is a new invention within the meaning of the Act No. V of 1888. It is claimed for it that it combines cheapness, portability and adaptability to service requirements; a further contention is that it was for the Muir Mills Company, Limited, to prove that the tent was not properly the subject-matter of a patent, and not for the appellant to prove the contrary.

There is not in Act No. V of 1888 any definition of the term "invention." All that the Act says is to be found in s. 4, clause (1), where it is laid down that the term "invention" includes an

improvement. Nor is much help to be derived from English Patent Law. In s. 46 of the Patent Designs and Trade Marks Act of 1883 "invention" is defined to mean any manner of new manufacture the subject of letters patent and grant of privilege within s. 6 of the Statute of Monopolies, and includes an alleged invention. Great stress was laid by the learned counsel for the appellants upon the concluding words "includes an improvement," and upon the fact that those words occur in the Act of 1859 and have been produced again under the definition of "invention" in Act No. V of 1888. He maintains that as he can show that the tent, the subject-matter of this dispute, is an improved tent as compared with other tents, it must be taken to come within the term invention as used in Act No. V of 1888. He clears the ground by expressly alleging that his clients do not claim anything new in the component parts of the tent, but they claim a combination, which from the points of portability, cheapness, accommodation, lightness and general suitability is far in advance of other tents of the same class hitherto known. He called our repeated attention to evidence in the case, particularly that taken by commission of Lieutenant-General Sir Charles Gough, as showing that his clients had satisfied what was wanted by the Military Department at that time, where others had made similar tents and failed. Thus, as his clients had brought into existence an improved tent and no identical tents had been proved to be in existence or used before, he claimed that the terms set out in the Act had been satisfied and that his tent was an "invention."

For the nature and description of the subject-matter of this litigation no better evidence can be cited than the evidence of Mr. Cline, the gentleman who claims to be the inventor. This will be found set out in the judgment from which this appeal has been filed. From a perusal of it, it is abundantly evident that the result at which Mr. Cline arrived was not arrived at by any act or process of welding into one new manufacture substances which had previously been known and in common use in the manufacture of tents. What Mr. Cline did is summed up, and justly summed up, by my brother Blair in his judgment when he says that the result attained was

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"neither more nor less than an aggregate of colorable deviations from perfectly well-known existing types." In support of his argument that the "combination," as the learned counsel would term it, of these perfectly well-known types is recognized as a proper subject for a grant of Letters Patent, we were referred to the case of *Hill v. Thompson and Foreman* (1), and particularly to the passage where Lord Eldon lays down that there may be a valid patent for a new combination of materials previously in use for the same purpose or for a new method of applying such materials. This is perfectly correct; but the case before Lord Eldon was one concerning the use or application of slags or cinders thrown off by the operation of smelting to the production of good and serviceable metal, and the combination of which the Lord Chancellor spoke, and spoke with some doubt as to its being a good subject for a patent, was a method of producing a more beneficial and effectual result from the adhibition of materials previously known. The next case to which we were referred was that of *Crane v. Price* (2), wherein it was laid down that if the result produced by a combination of a particular kind were either a new article or a better article or a cheaper article to the public than that produced before by the old method, such combination is an invention or manufacture intended by the statute and may well become the subject of a patent. The combination here under consideration was the application of anthracite or stone coal combined with hot air blast in the smelting or manufacture of iron from ironstone, &c. It was, as pointed out, a combination which fell within the principle exemplified by Abbott, C. J., in *Reg. v. Wheeler* (3) as a new process to be carried on by known implements or elements acting upon known substances and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner or a better or more useful kind. In that case a number of instances are given in which patents were granted where the invention consisted in no more than in the use of things already known, and acting with them in a manner already known, and producing effects already

(1) 3 Mer. 622; 1 Web. P. C. 229.

(2) 1 Web. P.C. 303.

(3) 2 B. and Ald. 345.

known, but producing those effects so as to be more economically or beneficially enjoyed by the public. All the instances given are, however, instances not of producing a result by the mere juxtaposition of materials already known but of producing a result by welding or fusing into one substance two or more materials already known.

The third case quoted was that of *Cunnington v. Nuttall* (1). This was the case of a combination obtained by the applying of a well-known principle in the mode of manufacturing glass, a combination which involved the mechanical action of several materials so as to result in a perfectly new and distinct result.

The cases of *Murray v. Clayton* (2) and of *Sykes v. Howarth* (3) were also cases of combinations involving mechanical processes, and in this respect differ from the combination for which a patent is claimed in the present case. In short, we have not been referred to a single case either in English or Indian law where a patent has been the subject of litigation and held valid in which the combination was merely the result of placing one known material side by side with another known material and ending in a result which differed only from previous results because the particles or materials thus placed in juxtaposition produced a result which might be considered an improvement or better adapted for a particular purpose.

We agree, therefore, with the view which was taken in the judgment under appeal and find in the subject-matter of this appeal no invention such as would entitle it to be protected by a patent.

As regards the contention that the burden of proof has been wrongly laid, we are of opinion that this too fails. Under s. 30 of Act No. V of 1888 any person may apply to a High Court for a rule to show cause why the Court should not declare that an exclusive privilege in respect of an invention has not been acquired. Upon trial of questions of fact arising upon such an application, such as arose in this case, whether or not the tent was a new inven-

(1) L. R. 5 E. and I. A. 205. (2) L. R. 7 Ch. App. 570.

(3) L. R. 12 Ch. Div. 826.

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tion, it seems to us that it is for the person who claims an exclusive privilege and is in possession of the facts which, in his opinion, entitle him to that exclusive privilege, to show that those facts exist.

No authority to the contrary was shown to us.

AIKMAN, J.—I concur with my brother Knox in thinking that this appeal must be dismissed. In my opinion the tent devised by Mr. Cline is not a new invention within the meaning of the Act and cannot therefore form the subject-matter of a valid patent. The word "invention" is nowhere authoritatively defined in our law. Subsection (1), s. 4 of the Inventions and Designs Act, 1888 ("invention includes an improvement") is not a definition. The learned counsel for the appellant company contended strenuously that as the new tent was approved of by the military authorities, it was evidently an "improvement" on pre-existing tents and was therefore an "invention" with reference to the above quoted subsection.

But although an "invention" includes an improvement, it does not by any means follow that every improvement is an invention. It is impossible, I consider, to lay down any hard-and-fast rule as to what improvements should be considered to be inventions.

To justify the grant of the exclusive privilege of a patent, there must be a certain amount of invention or inventive faculty displayed.

It will be a question for the Court to determine whether the amount of inventive power displayed is such as to justify the grant of a patent. What the inventor here claimed as the subject-matter of a patent is, to use his own words, "a new general combination of a tent." By this I presume he means a combination of various features found in previously existing tents so as to form what is practically a new tent. Although every invention may be said to be a "combination" of some kind, it by no means follows that every "combination" deserves to be called an invention. The question we have to ask in this case is, "did the combination in question require

(to employ the words used in *Sazby v. Gloucester Wagon Co.* (1) an exercise of such an amount of skill and ingenuity as to entitle it to the protection of an exclusive grant?"

This question must, I hold, be answered in the negative. How was the tent in question evolved? The military authorities wanted a tent with a certain amount of accommodation within certain limits of price and weight, and Mr. Cline devised a tent with which the military authorities professed themselves satisfied. How was this result attained? Not by the employment of any novel material in the construction of the tent, or by the adoption of any new time-saving or labour-saving process, but simply, as is clear from Mr. Cline's evidence, by cutting down the quantity of material employed. The first advantage which is claimed by the appellants for their tent is its cheapness. But this cheapness can only result from one of two causes; either from the appellants being content with a smaller margin of profit, or from less material being employed; and neither of these reasons would supply an adequate ground for a patent.

The greater portability claimed for the tent is in like manner due simply to less material being employed in its construction. And an inspection of the tent has satisfied me that this advantage has been gained by the sacrifice of comfort and practical utility.

That the so-called invention has no real claim to novelty is in my opinion proved. It was at the instance of Sir Charles Gough that the patent was applied for, and yet he is compelled to admit that, except in one trifling detail, the number of tent pegs, "it would require a very expert person to notice any difference" between the patent tent and the old bell tent (see his cross-examination on p. 3 of respondent's paper-book).

I concur in thinking the appeal should be dismissed with costs.

Appeal dismissed.

(1) L. R., 7 Q. B. D., 305, at p. 312.

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v.
THE
MUIR MILLS
COMPANY.

Atkies, J.

PRIVY COUNCIL.

IN THE MATTER OF PARBATI CHARAN CHATTERJI, APPELLANT.

[On appeal from the High Court at Allahabad.]

Reasonable cause, within s. 8 of the Letters Patent (High Court, N.-W. P.), 17th March 1866—Offer to give a gratification, contrary to s. 36 of the Legal Practitioner's Act, (XVIII of 1879)—Abetment, within ss. 41 and 116, Indian Penal Code—Special law.

A vakil of the High Court signed and sent a letter to another vakil of that Court, who practised in District Courts subordinate thereto. The purport of this, which was one of several printed forms prepared for circulation to vakils practising in districts, was to the effect that the vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal," to the writer, who would conduct them in that Court. And,—“as a remuneration,”—the fees paid by the clients would be shared between the writer and the vakil who had sent the cases.

The Judicial Committee concurred substantially in the conclusions of the High Court that this was an incitement within s. 116 (abetment) of the Indian Penal Code to commit an offence made penal by s. 36 (which was a special law within s. 41 of that Code) of Act No. XVIII of 1879, the Legal Practitioners' Act. This misconduct had been aggravated by the appellant's having denied to the Vakils' Association, North-Western Provinces, and caused evidence to be called to negative his having signed the printed letter, which he had signed. Thus, there was "reasonable cause," within s. 8 of the Letters Patent of March 17th, 1866, establishing the High Court, for his suspension, to which, for four years from the date of that Court's order, his punishment was reduced.

APPEAL from a judgment and order (20th June 1893) of the Chief Justice and the Judges of the High Court.

The question here was whether the conduct of a vakil of the High Court had been such as to authorize and require the exercise of the power of the High Court, conferred upon it by s. 8 of the Letters Patent of the 17th March 1866, to remove or suspend a vakil.

On the 19th May 1891 he obtained a certificate of enrolment as one of the vakils of the High Court, having previously been authorized, in May 1882, to appear, plead and act in the subordinate Courts.

Present: LORD WATSON, LORD MORRIS and SIR R. COUCH.

On the 2nd May 1893 he was served with a notice to show cause why his name should not be removed from the roll of vakils, and why proceedings should not be taken against him for an offence against s. 36 of the Legal Practitioner's Act, 1879, coupled with the abetment sections of the Penal Code.

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On the 31st May 1893 cause was shown before a Bench of all the Judges of the High Court, and on the 20th June following their judgment was given by the Chief Justice, ending with an order that the name of this vakil should be struck off the Roll, and that he should return his vakil's certificate to the Registrar of the High Court. The notice to show cause followed upon a communication received by the Registrar from the Vakils' Association, North-Western Provinces, enclosing the printed letter which is set forth in their Lordships' judgment. That letter, addressed and sent to Mr. E. Newton, a vakil of the High Court practising at Meerut, had been forwarded to a member of the Bar at Allahabad, and had been brought to the notice of the Association. On the 15th December 1892, in answer to a letter from the Secretary of the Association, the appellant wrote denying, in effect, that the signature was his; and enclosed a letter of the 6th December from his clerk, Nand Kishore, in which the latter had stated that he, the clerk, had written the name. The Association then passed the following Resolution, dated the 30th January 1893 :—

"This Association considers the explanation of Mr. Parbati Charan Chatterji, regarding the printed letter received from the Bar Library, as unsatisfactory, and dissents from the views expressed therein as to the position of vakils. But having regard to the fact that Mr. Parbati Charan Chatterji has denied his signature to the letter in question, it is resolved that the said letter, together with Mr. Parbati Charan's explanation and enclosures thereof, be sent to the Registrar for the information of the Hon'ble Court, and that, pending the final orders of the Court, no action be taken by the Association in the matter.

"Resolved, further, that a copy of this resolution be furnished to Mr. Parbati Charan Chatterji."

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The letter was, accordingly, sent to the Registrar, who, on the 16th February, wrote to the appellant, asking directly whether the signature was his. The answer was evasive. Cause was shown on the 31st May, when a number of memoranda and of vakalatnamas, bearing the appellant's signature, were produced for the purpose of comparison with the signature to the letter in question. The conclusions of fact contained in the following extract from the judgment of the High Court, delivered by the Chief Justice on the 20th June, are all that are required for the purposes of this report. The analysis of the evidence which the judgment contained is omitted.

After stating the course of procedure the judgment continued as follows :—

“ At the hearing on the 31st May his Counsel had not admitted “ that the signature in question was made by Babu Parbati Charan Chatterji, although we understood Mr. Conlan to say that the “ signature would not be denied. Nand Kishore had been examined “ by Mr. Reid, with the object of showing that the signature had “ been made by Nand Kishore, and not by Babu Parbati Charan Chatterji. After the memoranda of appeal and the vakalatnamas “ had been examined by the Judges, by Mr. Reid, and by the “ Public Prosecutor, Aadit Kishore, who was a clerk of Babu “ Parbati Charan Chatterji, was called and examined by Mr. Reid, “ and was cross-examined by the Public Prosecutor. As Mr. Reid “ had examined Aadit Kishore as to certain alleged statements of “ Nand Kishore, which had not been put to Nand Kishore in cross- “ examination, Nand Kishore was recalled. We informed the “ Public Prosecutor that we did not require to hear him, and there- “ upon Mr. Reid replied on behalf of his client. We took time to “ consider what our orders should be.

“ This Court is, by s. 8 of Her Majesty's Letters Patent, under “ which this Court was constituted, empowered to remove or suspend “ from practice, on reasonable cause, any advocate, vakil or attorney “ on the Rolls of the Court. There is no power conferred on the “ Court to delegate to any other tribunal the exercise of that juris-

"diction in the case of advocates, vakils and attorneys. The
"reasonable cause" referred to in s. 8 of the Letters Patent
"must be made out by the admission of the party concerned, or on
"evidence, to the satisfaction of the Court. There is, in these Pro-
"vinces, no body or authority other than the Judges of this Court,
"sitting as a Court, which can act under s. 8 of the Letters
"Patent, or can remove, or suspend from practice, any advocate,
"vakil or attorney on the rolls of this Court. Sections 12, 13, 14
"and 15 of Act No. XVIII of 1879 do not expressly apply, and
"are by s. 38 of that Act expressly excluded from application
"to advocates, vakils and attorneys admitted and enrolled by any
"High Court under the Letters Patent by which such Court is
"constituted.

"Consequently this Court was the only authority the attention
"of which the Vakils' Association could invite to the conduct of
"Babu Parbati Charan Chatterji in his capacity as a vakil.

"Pursuant to the direction and authority given by s. 27 of
"Act No. XVIII of 1879, this Court has from time to time fixed
"and regulated the fees payable by any party in respect of his
"adversary's advocate, pleader, vakil or attorney. The fees so pay-
"able are, as a rule, *ad valorem* fees on the amount or value of the
"claim. Such fees as are allowable on taxation between party and
"party in respect of an advocate, vakil or attorney in this Court,
"upon all proceedings on the appellate side of this Court, are fixed
"and regulated by the rules of this Court Nos. 204 to 223,
"including rules 222A, 222B and 222C. These rules had been
"published in the local official *Gazette*, and were in force on, and
"prior to, the 10th October 1892.

"The fees allowable on taxation between party and party in
"respect of an advocate, pleader, vakil or attorney in a Civil Court
"subordinate to this Court, upon all proceedings in such subordinate
"Court, are fixed and regulated by rules 37 to 51 of Circular Order
"of this Court No. 9 of 1889, and the Circular Order of this Court
"No. 5 of 1889, which were published in the local official *Gazette*
"and were in force on, and prior to, the 10th October 1892.

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"Rule 199 of the rules of this Court of November 30th, 1889, which was referred to in the course of the arguments on behalf of Babu Parbati Charan Chatterji, is as follows:—'Any advocate, attorney and vakil on the Rolls of the Court, not under suspension, may, in this Court and without filing any vakalatnama, appear, plead and act for any other advocate, attorney or vakil on the Rolls of the Court, not under suspension, in any suit, appeal or proceeding in the Court in which such other advocate, attorney or vakil is engaged for a client.' That rule was made by the Court in the interests of parties to litigation in this Court, and to enable the Court to dispose, without constant adjournments, of cases on the Daily Cause Lists. Prior to the making of rule 199 an advocate, attorney or vakil, who happened to be engaged before one Bench, could not have his brief held for him by an attorney or vakil in a case before another Bench, unless such last-mentioned attorney or vakil had obtained and filed in the case a vakalatnama. Rule 200 of the rules of this Court of November 30th, 1889, is as follows:—'No attorney or vakil, except when representing an advocate or another attorney or vakil, shall appear or plead in any suit, appeal or proceeding in this Court until he has filed a vakalatnama authorizing him to act in the matter.'

"This Court, under the circumstances mentioned in rule 199, but not otherwise, permits advocates, attorneys and vakils to hold briefs for each other in this Court, but does not recognise, nor has it ever recognised, any acting in business in the Court of an advocate, attorney or vakil as the agent or partner of any advocate, attorney or vakil practising locally elsewhere. To recognise any such acting would be to open wide the door for the evasion of s. 36 of Act No. XVIII of 1879. Section 36 of Act No. XVIII of 1879 applies to all legal practitioners, including advocates, attorneys, vakils, pleaders and mukhtars. One of the objects of rules 222A and 222B was indirectly to put a stop to practices which, the Court was aware, existed, and which were offences under s. 36 of Act No. XVIII of 1879. The other object was to ensure, as far as the Court could, that no

"fees to an adversary's advocate, attorney or vakil should be
"allowed on taxation between party and party, except such as had
"been *bonâ fide* received and retained for work done in this Court
"by the advocate, attorney or vakil, and had been received before
"the Court's order as to costs in the particular case was made.

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"As Mr. Conlan in the course of his argument on behalf of
"Babu Parbati Charan Chatterji drew our attention to paragraph
"10 of the report of the 21st of August 1879 of the Select Com-
"mittee to which the Bill, which subsequently became Act No.
"XVIII of 1879, was referred, we shall quote that paragraph
"before proceeding to a consideration of the evidence and the argu-
"ments in the case. The report was published in the *Gazette of*
"*India*, Part V, of the 23rd of August 1879, at pages 841 and 842.
"Paragraph 10 of that report, which refers to what subsequently
"became s. 36 of Act No. XVIII of 1879, is as follows:—
"Section 36 has been framed to put a stop to what is commonly
"known as the 'touting' system—a system under which certain
"legal practitioners reward a *mukhtar* or other hanger-on of the
"Court who brings them business by allowing him a percentage on
"their fees. It is obvious that such a system, besides the degrada-
"tion it involves to legal practitioners who resort to it as a means
"of obtaining business, also holds out to the *mukhtar* or other go-
"between a strong temptation to retain for his employer, not the
"most skilful pleader he can get for the fee allowed, but the pleader
"who will pay him the largest commission. The only objection
"we have heard to the abolition of this most objectionable system
"has proceeded from certain mukhtars, who urge that the commis-
"sion allowed them by vakils is not a remuneration for procuring
"the employment of such vakils, but a payment for assistance
"rendered by them to such vakils by performing certain duties
"which would in other cases be performed by an attorney. The
"answer to this objection, it appears to us, is that, when the trans-
"action is one *bonâ fide* of the nature thus described, the mukhtar
"can find no difficulty in agreeing with his employer to receive
"direct from him any remuneration to which he may be entitled."

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“Section 36 of Act No. XVIII of 1879 makes it an offence for
“any legal practitioner to tender or give to any person, whether
“such person is a legal practitioner or not, or to consent to the reten-
“tion by any person, whether such person is a legal practitioner or
“not, of any gratification for procuring or having procured the
“employment in any legal business of himself, or any other legal
“practitioner. Section 36 also makes it an offence for any person,
“whether a legal practitioner or not, to receive from any legal prac-
“titioner any gratification in consideration of procuring or having
“procured his employment in any legal business. Section 46 of
“the Indian Penal Code (Act XLV of 1860), read with sections
“40, 41 and 107 of that Code, would make any person liable to be
“punished criminally as an abettor, who instigated any other person
“to commit an offence against s. 36 of Act XVIII of 1879,
“although the substantive offence under that section might not be
“committed. That such is the law is made clear by the illustration
“to section 116 of the Indian Penal Code. Before dealing with
“the facts we shall consider what were the arguments addressed to
“us by Mr. *Coman* and Mr. *Reid*, on behalf of their client. It
“was contended that Babu Parbati Charan Chatterji was uncertain
“whether the signature to the letter of the 10th October 1892 to
“Mr. Newton was, or was not, his signature; that when the vakil
“was asked by the Vakils' Association whether he signed the letter
“himself he questioned his clerk, Nand Kishore, on the subject, and
“the clerk, at the suggestion of the vakil, wrote stating that he,
“the clerk, had signed the letter in question, and some others which
“were despatched on the 10th October 1892. It was also contended
“that what was suggested in the letter to Mr. Newton, and in the
“letters to others, was the formation of a limited partnership
“between Babu Parbati Charan Chatterji and each of the persons
“to whom a letter was sent, for the transaction of legal business in
“the High Court. It was further contended that on the true
“interpretation of the letter, Parbati Charan was not offering to
“share his fees with Mr. Newton in business, which might be sent
“to him by the latter's recommendation or assistance, as a gratifica-
“tion to Mr. Newton for procuring him legal business, but that

"Parbati Charan was merely offering to pay out of his fees a remuneration to Mr. Newton for such services as Mr. Newton might render in preparing a brief, or instructions, for Parbati Charan. It was also contended that the latter intended the suggested arrangement to apply only to those cases coming to this Court in appeal in which he and Mr. Newton would be retained together in the appeal in this Court, and in which each of them would file, in this Court, a vakalatnama. In support of this latter contention Mr. Conlan relied upon the 'corrected and unsigned printed letter' which was enclosed in Parbati Charan's letter of explanation of the 15th of December 1892 to the Vakils' Association. When we asked Mr. Conlan if his client could give the name of even one legal practitioner to whom a letter so corrected had been sent, he stated that Parbati Charan had been unable to give the name of anyone. It will be seen, later on, that letters in the form of the one sent to Mr. Newton were sent to sixteen or twenty different legal practitioners, and that the despatch of such letters took place on three different days.

"It was also contended that the conduct of vakils should not be judged by the same standard as that to be applied to advocates who are barristers, and that Parbati Charan was by his proposed arrangement trying to counteract the alleged illegal practices of vakils in procuring legal business by the payment out of their fees of remuneration to persons who procured their employment in appeals and other legal business."

After further consideration of the arguments, and after discussing the evidence, the judgment proceeded thus:—"In our opinion the letter of the 10th of October 1892 was nothing else than a letter offering to remunerate Mr. Newton for the procurement of legal business for Babu Parbati Charan Chatterji, who thereby was inciting Mr. Newton to commit an offence which was made penal by s. 38 of Act XVIII of 1879, and we so find. We find that Babu Parbati Charan well knew that in sending that letter of the 10th of October 1892 to Mr. Newton, and the other letters which were sent under his signature and by his orders

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"to other legal practitioners in these Provinces, he was committing
"not only a grossly improper act as a vakíl, but was endeavouring
"to do, and to induce others to do, acts which were made penal by
"the Indian Legislature, and to originate and carry on for his own
"benefit under the thinnest possible disguise a system of *dalali* as
"pernicious in its consequences as the system of *dalali* which he
"alleges to be in practice amongst the members of the Vakíls'
"Association, and which he professes to reprobate. He had been a
"legal practitioner since 1882, and a vakíl of this Court since the 10th
"of April 1891, and could not have been ignorant of the fact that
"since 1867 this Court, which was established in 1866, has, in the
"interests of suitors and of the profession to which he belongs, been
"vainly striving to put a stop to the system of *dalali*, by which
"certain legal practitioners procure their employment in legal busi-
"ness by sharing their fees in cases brought or sent to them with the
"persons who for such remuneration, and entirely irrespective of their
"merits and regardless of the interests of the suitors, bring or send
"legal business to such legal practitioners.

"In considering what our order should be in this case we cannot
"treat Babu Parbati Charan Chatterji as we might treat a young and
"inexperienced man who, in ignorance of the character of his act, had
"transgressed the rules of professional good conduct and brought
"himself unwittingly within the reach of the criminal law; we can-
"not overlook the fact that, in order to conceal the true nature of
"his act, Babu Parbati Charan Chatterji induced his clerk, Nand
"Kishore, to sign the letter of the 6th of December 1892, which
"contained false statements as to the facts, or the fact that Babu
"Parbati Charan Chatterji used that letter to deceive the Vakíls'
"Association of which he was a member; nor can we overlook the
"fact that Babu Parbati Charan Chatterji instructed his counsel to
"call Aadit Kishore to give evidence, which he, Babu Parbati
"Charan Chatterji, must have known was false evidence. We
"regard these acts as aggravations of his offence. In this country,
"in which the concocting of false evidence and the preparation of
"false documents is but of too common occurrence, it is essentially

"necessary in the interests of the public that the legal profession should be kept as pure as possible. The duty which is imposed on this Court in the case of advocates, vakils and attorneys of this Court by s. 8 of Her Majesty's Letters Patent, and in the case of pleaders and mukhtars holding certificates under this Court by Act No. XVIII of 1879, is a grave and important, no less than a painful, duty, which the Court must perform in the interests of the bar, of the public and of the proper administration of justice.

"Our order is that Babu Parbati Charan Chatterji be struck off the roll of vakils, and that he return his certificate forthwith to the Registrar of this Court.

"As to the other rule, calling upon Babu Parbati Charan Chatterji to show cause why he should not be directed to be prosecuted criminally, we discharge it. We should say that no attempt was made by or on behalf of Babu Parbati Charan Chatterji to prove that any advocate of this Court had expressed any approval of the letter of the 10th of October 1892, of the 'corrected and unsigned printed letter,' or of the arrangement which Babu Parbati Charan Chatterji had suggested or of the course which he adopted, and that nothing has appeared in this enquiry which detracts from the good character which Mr. Newton bears in the profession."

On this appeal Mr. J. H. A. Branson and Mr. G. E. A. Ross, for the appellant, argued that the letter of the 10th October 1892 should have received a construction more favourable to the appellant than it had. Without the application of ss. 41 and 116 of the Indian Penal Code to the special law of Act XVIII of 1879, s. 36, the act of the appellant in sending that letter could not have been dealt with as an infringement of the law; for there had not been, in fact, any tendering, giving or consenting to the retention of any gratification for procuring the employment of the appellant in legal business. The procuring business by agency paid for the purpose was the evil against which s. 36 was aimed; but a construction which the letter in question would bear was not that the appellant would directly pay for business being sent to him, but that the vakil whom he addressed would have the advantage of being himself

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employed, and paid for any work that he might perform. The advantage that the appellant might be understood to have offered was employment in return, there being no direct offer of payment for sending cases, but of payment for work that might be done for the client, of whose case the writer requested the guidance into his hands. However irregular such a participation in fees as was suggested might be, this construction was not identical with an abetment of an offence under s. 36. It must be remembered that the present case was that of a vakil of the High Court writing to another vakil of the same Court, and writing in a manner that showed him to be most desirous of keeping within the law. He not only expressed himself anxious to do so, but his object was to substitute a plan for the "dalal" system, which plan, although it might have been in itself reprehensible, was not in itself so clear a contravention of the law. That was so if this more favourable construction of the letter should be adopted. The real question, however, was whether or not the appellant's conduct had been such as to show him to be unfit to remain a vakil of the High Court, and such as to call for the exercise of the Court's power under s. 8 of the Letters Patent. It was submitted that neither in the sending of the letter now in question, nor in the subsequent denial of the signature, had the appellant been guilty of conduct which required a sentence so severe as that which had been pronounced upon him by the High Court. That Court had considered the appellant to have aggravated the original offence by his subsequent conduct, but there were circumstances which rendered it suitable that a mitigated sentence should be passed even if the same view were now taken of the appellant's case as that which had been taken by the High Court. Reference was made to *In the matter of F. W. Quarry* (1).

Their Lordships' judgment was delivered by LORD MORRIS:—

The facts giving rise to this case are few in number. It appears that the appellant, who was enrolled as a vakil of the High Court in 1891, procured to be printed and forwarded a circular letter, in

(1) L. R., 19 I. A. 199; I. L. R., 13 All., 93.

October 1892, to, amongst other persons, a Mr. Newton, a vakil of the High Court, who was practising in that capacity in the District Court of Meerut. The letter addressed to Mr. Newton was in the following terms :—

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“ Allahabad,

“ Dated 10th October, 1892.

“ From PARBATI CHARAN CHATTERJI,

“ Vakil, High Court,
Allahabad,

“ To E. A. NEWTON, Esq.,

“ Vakil, High Court,
Meerut.

“ (Private and confidential.)

“ DEAR SIR,

“ I hope you will pardon me for taking the liberty thus to address you privately and confidentially for co-operation in a matter of business which may, if you agree with me, be calculated to promote our mutual interest.

“ Without intending to boast, I venture to say that, as a vakil of the High Court, I claim the credit of working very hard in the interests of my clients whose cases are filed by me in the High Court. Being a High Court vakil yourself, now practising in the District Court, you can, if you choose, very easily send your clients' cases, both civil and criminal, which are fit to be filed in the High Court, to me, with a brief statement of the same, whenever necessary, and I shall undertake to conduct the same here. You may, I hope, find this course more businesslike and beneficial than the other one of allowing your clients to drift as they like after a case is lost in the Lower Courts.

“ As a remuneration for your labours, I undertake to share with yourself, being a High Court vakil, the fees which may be paid by your clients to me; but the fees ought to be settled beforehand in almost every case, so far as possible, so that we may know whether a particular case will pay our joint exertions or not.

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* ["If you are a District Court pleader, the law, I think, prohibits me from sharing the fees of a High Court case with your-
self.

"In that event, arrangement may be made in every case with clients to pay you separately for your labour in preparing briefs, &c., in the case.]

"If you approve of the suggestions made in this private letter and intend actually to co-operate, I shall feel obliged by your signifying your intentions to me as early as you find convenient to do so.

"Lastly, I request you to treat this letter as strictly private and confidential.

"Yours faithfully,

"P. C. Chatterji,

"Vakil, High Court.

"By mutual consent and mutual aid,

"Great deeds are achieved and discoveries made.'"

"(Private and confidential.)"

Their Lordships do not think it necessary to go in detail into the matter, because they entirely agree with the conclusions arrived at by the High Court, namely, that the letter was within section 36 of Act No. XVIII of 1879.

Their Lordships also concur substantially in the conclusions arrived at by the High Court as regards the conduct of the appellant in having, at first, endeavoured to deny his signature to that letter, and also as regards the circumstances connected with the prosecution of the case before them.

The only question which remains to be considered is as to the amount of punishment inflicted by the High Court. The High Court directed the appellant to be struck off the Roll of Vakils, and to return his certificate to the Registrar of the High Court. Their

* Inasmuch as Mr. Newton was a vakil of the High Court, the words in the circular letter which are in brackets were struck out of the letter sent to him.

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Lordships have come to the conclusion that this punishment may properly be mitigated. It is plain that the appellant in writing the letter thought that he was keeping within the law. He evidently wanted to go as close to the limits of the law as he possibly could without violating its provisions. This is shown by the fact that the bracketed paragraphs in the letter were to be struck out or retained according as the letter was addressed to a vakil of the High Court or not.

The number of letters which the appellant wrote to other persons besides Mr Newton corroborates this view; for although the letters were marked "Private and Confidential," the appellant could never have imagined that what he was doing would not very rapidly become known. He thought that he had not violated the Act; and although he was clearly wrong in so thinking, their Lordships consider that it is a not unimportant element in the consideration of the punishment that should be meted out to him, that he did not wilfully violate the Act, but considered that he did not come within it.

Upon the whole facts of the case their Lordships are of opinion that the Order of the High Court should be varied, by directing that the appellant be suspended from practising as a vakil for a period of four years from the 20th June 1893. Their Lordships will humbly advise Her Majesty accordingly.

Order varied.

Solicitors for the appellant: *Messrs. Barrow and Rogers.*

CHAJMAL DAS (PLAINTIFF) v. BRIJ BHUKAN LAL AND ANOTHER
(DEFENDENTS).

[On appeal from the High Court at Allahabad.]

Interest on loan debt 'post diem solvendi.'

On the construction of a written contract to repay in two years from its date, money with interest at fifteen per cent. to be paid half-yearly, arrears of interest being added half-yearly to the principal, the Judicial Committee concurred with the High Court that there was no contract to pay interest at that rate after the date fixed for repayment.

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*May 3rd,
July 20th.*

Present: LORDS HOBHOUSE, MORRIS and DAVEY and SIR R. COUCH.

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Held, that on that construction the creditor would be entitled, on default made in the repayment, to receive interest, but, technically, as damages assessed; and that the rate *prima facie* would be the same as that provided by the contract during the two years, although there is no rule of law making that rate necessarily the measure of the damages. The compounding the interest after the expiration of the two years was disallowed, and an account was directed on the basis that the interest '*post diem*' should be simple, at 15 per cent. down to the date of the plaint, and after that date at six per cent. till payment.

APPEAL from a decree (7th March 1889) of the High Court, reversing a decree (3rd September 1887) of the Subordinate Judge of Mainpuri.

This suit was brought on the 18th March 1887 by the appellant, a zamindár and mahajan of Etah in the Aligarh district, against Narain Lal, Brijbhukan Lal and Raghubans Rai, described as legal heirs of Banki Lal, debtor, deceased in 1876 or 1877, who had executed a mortgage bond, dated the 20th March 1873, securing money lent to him by the plaintiff. With the defendants was joined Musammat Genda Puri, wife of Narain Lal, as *dakhil kharij* had been made in her name. She died on the 2nd August 1890; and Narain Lal died while this appeal was pending. The claim was for Rs. 5,000 principal, and Rs. 11,000 interest, to be realized by sale of any of the property of Banki Lal, not only of that mortgaged.

The plaint set forth the mortgage bond, which is stated in their Lordships' judgment and added:—

"The Rs. 5,000 fell due on the 21st March 1875, when the cause of action first accrued. The deceased debtor paid in his lifetime Rs. 630 towards the half-yearly interest; and afterwards Musammat Sarsuti, his widow, and heiress, having succeeded to his estate, paid, on the 16th April 1877, Rs. 4,846, by executing and registering a lease to the plaintiff of zamindari villages, of which he remained in possession."

Sarsuti died before this suit was brought. The answer filed by Narain Lal alleged, amongst other things, that according to the accounts a balance would appear in favour of the estate, the

plaintiff having been in possession of the mortgaged villages since the Fasi year 1283.

The questions now raised were whether the construction, placed by the High Court on the document of 20th March 1873, was right, and whether the plaintiff was not entitled to interest '*post diem*.' The matter of the interest was raised by an issue fixed in the Court of first instance, and was the subject of the difference of opinion between the original and the appellate Court.

The Subordinate Judge decreed the claim. On an appeal by Narain Lal and Genda Puri, a division Bench of the High Court (EDGE, C.J., and TYRRELL, J.) gave the judgment, of which the following part is alone material to this report:—

"The third point, and the really material point which was argued before us, related to the plaintiff's claim for interest *post diem*.
"The plain construction, according to our view, of the mortgage in question, so far as interest is concerned, is that there was a covenant to pay the principal and interest at the expiration of two years, and there was no covenant to pay interest *post diem*. There is nothing in the record from which we can infer that it was the intention of the parties that *post diem* interest should be payable. If it was the intention of the parties that interest should be payable *post diem*, it would have been very easy to express that intention by the use of a few apt words to that effect. There is nothing here to show that it was contemplated that any interest *post diem* should be payable. It has been contended that from the covenant not to assign it may be inferred that it was the intention of the parties that interest *post diem* should be payable. We do not put that construction upon that covenant. And even if it bore any construction such as suggested, we would hesitate to extend a covenant which expressly deals with the payment of principal and interest by a subsequent covenant dealing with another matter. We have been referred to two cases decided in this Court. One of those was the case of *Baldeo Pandey v. Gokal Rai* (1); and we may remark that the head-note in that case is to a certain extent misleading. It could

(1) I. L. R., 1 All., 603.

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"not have been found in that case that there was an express contract for the payment of interest after the due date. Our reading of the document then in question is that there was in fact no express contract of any kind. The terms of that contract were in some respects different from the present, and there were indications from the conduct of one of the parties that in his view the contract was that he had to pay *post diem* interest. How far that circumstance may have influenced the mind of the learned Judges in construing the contract we do not know. The other case was that of *Chhab Nath v. Kamta Prasad* (1). The contract there again is to some extent different from the contract before us, and was apparently similar to that in *Baldeo Panday v. Gokal Rai*. The learned Judges in that case considered that they were bound by the decision of *Baldeo Panday v. Gokal Rai*.

"We do not consider, under these circumstances, that we are bound to construe this document as those Judges construed the document before them. It appears to us that there is considerable danger attending the applying to one document the judicial construction which has been, in a previous case, applied to another, unless the two documents are exactly in the same terms. This is a danger which has been strongly pointed out by the late learned Master of the Rolls in England, Sir George Jessell. We have come to the conclusion that there was here no contract to pay interest *post diem*. In this case, after the death of the mortgagor his widow granted a lease to the mortgagee for a term of ten years, and by that lease a portion of the rent of the land leased was to be applied by the mortgagee towards the satisfaction of the interest accruing or due under the mortgage. We do not think that we can look at that transaction as a means of putting a construction upon the mortgage in question. The lady was a *pardah-nashin* lady, the mortgagee was her legal adviser, and we have no evidence to show that she had any independent advice as to her position or her liabilities under her deceased husband's bond. The result is that we allow the appeal thus far that we hold that the mortgagee was not entitled

(1) I. L. R., 7 All., 333.

"to any interest *post diem*; that he is entitled to have a decree for Rs. 5,000; and that he would also be entitled, if no interest had been paid at all, to a decree for interest for two years: but as he admits that Rs. 4,706 has been received by him as interest, we need not consider the question of interest at all. We vary the decree below by giving the plaintiff a decree for Rs. 5,000, enforceable by sale of the hypothecated property, without any interest. Three months' time is allowed for the payment of the money by the judgment-debtors from the date when our decree reaches the Court below. Costs here and below will be paid by the parties in proportion to their success and failure."

Mr. C. W. Arathoon, for the plaintiff, argued that the High Court's construction of the document of the 20th March 1873 was not correct. Interest '*post diem*' was in this case payable at the same rate as *ante diem*. The lease given by Sarsuti in April 1877 should have been considered to explain how interest was understood between the parties to be calculated after the expiration of the two years. Even assuming that the construction below was correct, the plaintiff should have been held entitled to interest as damages for non-payment on, and after, the due date. He referred to *Baldeo Pandey v. Gokal Rai* (1) [Their Lordships mentioned *Cook v. Fowler* (2) in which Lord Selborne said:—"There is no rule of law upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, that a further contract for the continued payment of interest at the same rate is to be implied."]. Mr. C. W. Arathoon continued to the effect that the rate of fifteen per cent. was the proper measure of damages, as a fair rate. On the subject of the allowance of such damages reference was made to *Gordillo v. Waguelin* (3).

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Act XXXII of 1839, relating to interest on money payable at a date fixed in writing, was also cited (4).

(1) I. L. R., 1 All., 603.

(2) 7 Eng. and Irish Ap. Ca. (H. L. 1874), p. 27.

(3) L. R., 5 Ch. D. (1877) p. 287.

(4) *Gopaludu v. Venkata Ratnam*, I. L. R., 18 Mad., 175; *Rama Reddi v. Appaji Reddi*, *ibid.*, 248; *Badi Bibi Sahibul v. Sami Pillai*, *ibid.*, 257, refer to interest.

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The respondents did not appear. Afterwards, on July 20th, their Lordships' judgment was delivered by LORD MORRIS.

This appeal has been argued before their Lordships *ex parte*. The appellant, Lala Chajmal Das, brought a suit in the Court of the Subordinate Judge of Mainpuri, on a bond dated the 20th March 1873, executed by Banke Lal, deceased. The respondents represent Banke Lal's estate.

The bond is as follows :—" I Banke Lal . . . do declare :—
" That I owe Rs. 5,000, half of which is Rs. 2,500, on account of
" former and present loans as detailed at foot, to Chajmal Das;
" . . . and that, admitting the said debt, I promise that I shall
" pay the said money, with interest at the rate of Re. 1-4-0 per cent.
" per mensem, in two years; that interest shall be paid six-monthly;
" that in case of default in payment of interest on the expiry of any
" six months, it will be treated as principal, and being included in
" the principal, shall bear interest at the said rate; that the com-
" pound interest shall also be added six-monthly to the principal;
" that all payments will be noted on the back of the bond, and if
" not so noted, no plea of payment, oral or supported by a receipt
" or acquittance, &c., shall be valid; that until payment of this
" money the zamindari property in the villages specified below,
" belonging to me and pledged by me formerly with some other
" properties, shall continue pledged and hypothecated for this
" money, and shall not be transferred to anyone in any manner;
" and that if a transfer is made, it would be invalid, and this money,
" principal and interest, be preferentially realisable. I have
" received back the former bonds, and accept this bond; no bond is
" held by, and no money is due to, the said creditor up to this day."

The appellant by his plaint, dated the 18th March 1887, alleged that according to the terms of the bond there was then due for principal and interest the sum of Rs. 26,605; but that, as the property of the debtor was insufficient to satisfy that amount, he only claimed the sum of Rs. 16,000, and relinquished the residue. Various questions were raised, and were determined by the Subordinate Judge, and, upon appeal, by the High Court; but the only

question upon which this appeal has been brought is the decision on the 8th issue. This issue was as follows :—"Is plaintiff entitled "to receive compound interest and interest for the period subsequent "to the date promised for payment, or not?" The Subordinate Judge was of opinion that the plaintiff was entitled to receive compound interest as claimed. The High Court on appeal reversed that judgment, and held that according to the true construction of the bond no interest was payable after the period of two years therein stated as the period fixed for the payment of principal and interest, and accordingly ordered that the respondents should only pay to the plaintiff the sum of Rs. 5,000, being the principal sum secured by the bond. Their Lordships are not prepared to dissent from the construction placed by the High Court on the bond in respect of there being no covenant by Banke Lal to pay interest after the fixed period of two years from the date of the bond, although it is difficult to suppose that this was the intention of the parties to the bond. But even on that construction the plaintiff would be entitled, on default being made in the payment, to recover interest technically as damages, and the rate would *prima facie* be the same as that provided by the bond during the two years, although there is no rule of law making that rate necessarily the measure of the damages.

Their Lordships are of opinion that the decrees of the Subordinate Judge and the High Court should be discharged; that an account ought to be directed by the High Court to ascertain what is due to the plaintiff on the bond up to the 20th of March 1875, adding interest to principal as provided by the bond; that it ought to be declared that on the amount so ascertained the plaintiff is entitled to simple interest up to the date of the plaint at the rate of 15 per cent. per annum, and to simple interest at the rate of 6 per cent. per annum from the date of the plaint to the date of payment; and that accounts should be taken under the direction of the High Court on this basis; and that the amount found to be due in the result to the plaintiff should be decreed to him by the High Court accordingly, but that the amount so decreed should not in any

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event exceed the sum of Rs. 16,000 claimed by the plaintiff. The defendants should pay to the plaintiff his costs incurred in the Court of the Subordinate Judge in proportion to the amount recovered by him. There should be no costs of the appeal to the High Court. The respondents must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the appellant:

Appeal allowed.

Messrs. *Hamlin, Grammer & Hamlin.*

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April 17.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

JAFAR HUSAIN (DEFENDANT) v. RANJIT SINGH (PLAINTIFF).*

Civil Procedure Code, s. 561—Appeal—Objections—Withdrawal of appeal—Failure of objections.

If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is withdrawn, the objections cannot be heard. *Bahadoor Singh v. Bhugwan Dass* (1); *Ram Pershad Ojha v. Bharosa Kunwar* (2); *Shama Churn Ghose v. Radha Kristo Chaklanuvis* (3); *Coomar Puresh Narain Roy v. Messrs. R. Watson & Co.* (4); *Subhai Dayalji v. Raghunathji Vasanji* (5); *Dhondi Jagannath v. The Collector of Salt Revenue and the Secretary of State for India in Council* (6) and *Maktab Beg v. Hasan Ali* (7) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* for the appellant.

The Hon'ble Mr. *Colvin*, Mr. *D. N. Banerji* and Babu *Rajendro Nath Mukerji* for the respondent.

EDGE, C. J., and BANERJI, J.—Pandit *Sundar Lal*, for the appellant, has withdrawn this appeal. It had been, as a matter of fact, called on, but it had not been argued or opened when Pandit *Sundar*

* First Appeal No. 319 of 1893, from a decree of Munshi Kamta Prasad, Assistant Collector, 1st class, of Bijnor, dated the 12th September 1893.

(1) N.-W. P. H. C. Rep., 1895, 23.

(2) 9 W. R., 323.

(3) 14 W. R., 210.

(4) 23 W. R., 229.

(5) 10 Bom. H. C. Rep., 397.

(6) I. L. R., 9 Bom., 28.

(7) I. L. R., 8 All., 551.

Lal elected to withdraw. The appeal is accordingly withdrawn. The respondent to the appeal had filed objections under s. 561 of the Code of Civil Procedure. Mr. *D. N. Banerji* asked to be heard in support of those objections. Pandit *Sundar Lal* objected that, the appeal having been withdrawn, there was no hearing of the appeal upon which the respondent was entitled to take any objection to the decree of the Court below. So far as this appeal is concerned, there is no essential difference between s. 348 of Act No. VIII of 1859 and s. 561 of the present Code of Civil Procedure. Section 16 of the Court Fees Act, 1870, also points to the objections being argued at the hearing of the appeal. There is a long list of authorities in favour of the contention raised by Pandit *Sundar Lal*: those which may be mentioned are:—*Bahadoor Singh v. Bhugwan Dass* (1); *Ram Pershad Ojha v. Bharosa Kunwar* (2); *Shama Charn Ghose v. Radha Kristo Chaklanvis* (3); *Coomar Puresh Narain Roy v. Messrs. R. Watson and Co.* (4); *Dubhai Dayalji v. Ragnathji Vasanji* (5); *Dhondi Jagannath v. The Collector of Salt Revenue and the Secretary of State for India* (6) and *Maktab Beg v. Hasan Ali* (7). Although a hardship arises in the case of a respondent who has taken advantage of the provisions of the Code of Civil Procedure, and filed objections to the decree under appeal, instead of filing a separate appeal, when the appeal is withdrawn, so as to deprive the respondent of his opportunity of supporting his objections, still we are bound to follow the long series of authorities, and hold that the respondent in this case cannot be heard in support of his objections. Many of the decisions, to which we have referred, were long anterior to the passing of Act No. XIV of 1882, and ever since that Act was passed, amendments to the Act have been made by the Legislature; and the Legislature must be presumed to have known the course of decisions to which we have referred, and to have decided that the respondent who takes advantage of the Code of Civil Procedure to object to the decree under appeal by way of objection, and not by way of appeal, shall run the risk of having his objections

(1) N.-W. P. H. C. Rep., 1866, p. 23.

(2) 9 W. R., 323.

(3) 14 W. R., 210.

(4) 23 W. R., 229.

(5) 10 Bom. H. C. Rep., 307.

(6) I. L. R., 9 Bom., 28.

(7) I. L. R., 8 All., 551.

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defeated and his right of appeal barred by the effect of the Limitation Act, 1877, and be left without any remedy against a decree which might be open to question. For the above reasons we are unable to hear the objections filed by the respondent, and hold that they have fallen with the withdrawal of the appeal.

Under s. 220 of the Code of Civil Procedure, we make an order directing the appellant, Syed Jafar Husain, to pay the taxed costs of this appeal to the respondent, Chaudhri Ranjit Singh.

1895
April 17.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.
MAHABIR SINGH AND ANOTHER (PLAINTIFFS) v. SAIRA BIBI AND ANOTHER
(DEFENDANTS).*

*Act No. IV of 1882 (Transfer of Property Act), s. 99—Usufructuary mortgage—
Suit by mortgagee for sale of equity of redemption of mortgaged property in
execution of a decree for mesne profits and costs.*

Certain usufructuary mortgagees not having been put in possession of the mortgaged property by the mortgagor sued and obtained a decree for possession with mesne profits and costs. Under this decree the mortgagees were put in possession of the mortgaged property. They then applied for attachment and sale of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property reserving their rights and interests under the mortgage. *Held*, that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act, 1882. *Azim-ullah v. Najm-un-nissa* (1) and *Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* for the appellants.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji* for the respondents.

EDGE, C. J., and BANERJI, J.—The plaintiffs in the suit in which this appeal has arisen were usufructuary mortgagees under

* First Appeal No. 106 of 1892, from an order of Munshi Lalta Prasad, Additional Subordinate Judge of Ghazipur, dated the 25th February 1892.

(1) I. L. R., 16 All., 415.

(2) I. L. R., 21 Calc., 24.

a mortgage of the 19th of June 1883, which had been made in their favor by the defendants in the suit or by those under whom they claimed. The plaintiffs had been kept out of possession of the mortgaged property, and were obliged to bring a suit for possession. They brought a suit claiming not only possession, but also *mesne* profits, and on the 30th of January 1889, they obtained a decree for possession, for *mesne* profits and for costs. The plaintiffs-mortgagees were put in possession under the usufructuary mortgage of the 19th of June 1883, in pursuance of the decree of 30th of January 1889. They then sought to attach for the purpose of bringing to sale the mortgaged property in satisfaction of that part of their decree of the 30th of January 1889 which decreed them *mesne* profits and costs. The Subordinate Judge before whom the application for attachment was made dismissed the application, holding that s. 99 of Act No. IV of 1882 barred the plaintiffs' claim to execute their decree by the sale of the mortgaged property. That order was confirmed on appeal by this Court, and, after the decision of this Court in appeal, the plaintiffs brought the suit out of which this appeal has arisen. In this suit they asked for a decree for sale of the equity of redemption maintaining the rights and interests of the plaintiffs as mortgagees. The Subordinate Judge dismissed the suit, holding that by reason of ss. 99 and 66 of Act No. IV of 1882 the suit did not lie. The plaintiffs brought this appeal from that decree.

Section 99 was enacted with the object of preventing a mortgagee bringing the mortgaged property to sale except in pursuance of a decree obtained in a suit allowed by s. 67. Prior to the passing of Act No. IV of 1882 it was the constant custom of mortgagees to obtain, on other causes of action than their mortgages, decrees for money against the mortgagor, to bring the mortgaged property to sale in execution of those money decrees, and to have it sold, reserving their rights as mortgagees. The result of that was that in such cases, the sale being notified as one in which the property to be sold was subject to a mortgage, purchasers would not come forward to run the risk of harassing

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litigation with the mortgagee in future suits, and the mortgagee or his *benamidar* was left in possession of the field, and in too many instances purchased the mortgagor's interest in the property for a mere song, and having got by such sale the mortgagor's interest for practically a trifling price, the mortgagee got the whole property into his hands. It was found from experience that the result of such a state of things was that the properties passed out of the hands of mortgagors into the hands of mortgagees in many cases for far less than their value, counting the mortgage-debt and the price paid at the sale under the money decree together. It was also found that such a state of things encouraged litigation, and it was to provide a remedy and to prevent the recurrence of such a state of things that s. 99 was enacted. It has been contended that in such cases the plaintiffs are placed in a difficult position. They are not entitled to bring a suit for sale under s. 67 on their mortgage, the mortgage being usufructuary, and it is suggested that by the time when they cease to be mortgagees, when s. 99 would cease to operate, their decree for money might be barred by limitation.

There may be in such cases individual hardships, but the law must have regard to the benefit of the greater number, and not to the particular benefit of persons in individual cases seldom occurring. There was nothing to prevent the respondents executing their decree of the 30th of January 1889, against property of their judgment-debtors other than the property the subject of the mortgage of the 19th of June 1883. We need not decide whether the plaintiffs have now a remedy against the property of their judgment-debtors other than the mortgaged property.

This suit in fact was brought not in accordance with the intention of the Legislature as announced in s. 99 of Act No. IV of 1882, but in contravention of the provisions of that section. We are supported in the view which we take by the decision of this Court in *Azim-ullah v. Najm-un-nissa* (1) and the decision in *Jadab Lal Shaw Chowdhry v. Madub Lal Shaw Chowdhry* (2).

We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 16 All., 415.

(2) I. L. R., 21 Calc., 34.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SHEOBARAT KUARI AND ANOTHER (DEFENDANTS) v. BHAGWATI PRASAD AND ANOTHER (PLAINTIFFS).*

1895
April 18.

*Hindu law—Hindu widow—Suit to set aside alienation by Hindu widow—
Reversioners—Grandsons of daughters of alienor's late husband.*

Held, in a suit to set aside an alienation made by a Hindu widow of property which had been of her deceased husband in his lifetime, that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners, and as such entitled to sue to set aside the alienation made by the widow. *Krishnappa v. Pichamma* (1) and *Babu Lal v. Nanku Ram* (2) referred to.

THIS was a suit to set aside an alienation made by a Hindu widow under the following circumstances:—One Sheo Charan Lal was owner of the whole of mauza Nigori and of a 2-anna share in mauza Amtari. He died long anterior to this suit, leaving a widow, Sheobarat Kuari, one of the defendants to the suit, and the son of a daughter, Gokul Prasad. The widow took possession of the estate. On the 26th of May 1874, the widow executed a deed in favor of Gokul Prasad and his half-brother, Ganesh Prasad, whereby a four-anna share in Nagori was at once transferred to them, while it was also declared that they were entitled to succeed to the residue of the estate on the death of the widow. In May 1891, Gokul Prasad died, and subsequently on the 23rd November 1891, Sheobarat Kuari by a duly executed and registered deed of gift made over a 12-anna share of mauza Nigori and the 2-anna share of Amtari to Nand Kishore, the second defendant. The plaintiffs were sons of Gokul Prasad. They sued to set aside the alienation to Nand Kishore, on the grounds, first, that the transfer was void as against them, because they were, under the Hindu law, *bandhus* of Sheo Charan Lal, and therefore his reversionary heirs, and, secondly, that by reason of the deed of gift of the 26th May 1874, the widow had no transferable right in the property.

The defendants resisted the suit on the grounds that the plaintiffs were not under the Hindu law *bandhus* of Sheo Charan Lal;

* First Appeal No. 27 of 1894, from a decree of Babu Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 17th November 1893.

(1) I. L. R., 11 Mad., 297.

(2) I. L. R., 22 Calc., 339.

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that under the deed of the 26th May 1874, the widow still had power to dispose of the property in question, excepting only the 4 annas of mauza Nigori; and that in any case the claim for possession could not be maintained in the lifetime of the widow.

The Court of first instance (Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim for a declaration that the alienation in question would not affect their interests in the property after the widow's death.

The defendants thereupon appealed to the High Court.

Munshi *Gobind Prasad* for the appellants.

Mr. *T. Conlan* and Mr. *Abdul Majid* for the respondents.

EDGE, C. J., and BANERJI, J.—The only question in this case is whether the plaintiffs were reversioners. If they were reversioners, they were entitled to maintain the suit. The last owner of the property was one Sheo Charan. He died leaving a widow, who made a deed of gift in favor of Nand Kishore, one of the appellants here, and one of the defendants to the suit. The plaintiffs are the sons of the son of a daughter of Sheo Charan. Their father and his mother died before suit. This case is governed by the decision in *Krishnayya v. Pichamma* (1), and is within the principle of the decision of the Calcutta High Court in *Babu Lal v. Nanku Ram* (2). We hold that these plaintiffs were *bandhus*, being *bhinna gotra sapindas* of Sheo Charan, and, there being no one nearer, they were reversioners and entitled to maintain the suit.

We dismiss the appeal with costs.

Appeal dismissed.

1895
April 27.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS v. PIRBHU AND OTHERS.

Act No. 1 of 1872 (Indian Evidence Act), s. 30—Joint trial—Statement of co-accused who pleaded guilty—Evidence.

Where two out of several persons on their trial in a Court of Session on a joint charge pleaded guilty and made certain statements to the Court, it was held that

(1) I. L. R., 11 Mad., 287.

(2) I. L. R., 22 Calc., 339.

such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as after pleading guilty the persons making those statements were no longer on their trial.

THE facts of this case sufficiently appear from the judgment of the Court.

The Officiating Public Prosecutor (Mr. *A. H. S. Reid*) for the Crown.

EDGE, C. J., and AIKMAN, J.—Pirbhu and seven other men, who were convicted of the offence punishable under s. 396 of the Indian Penal Code, have appealed. One of them, Gobind, was convicted of abetting. The dacoity in question was one which was carried out by some 22 or 25 men. They came under different leaders and from different districts of the country, and those who were not armed with carbines or blunderbusses or swords carried *lathis*. The villagers showed great pluck: they assembled and boldly attacked the dacoits: one of them was killed by the dacoits, and several were more or less severely wounded.

As to two of these appellants, Pirbhu and Kishan, they pleaded guilty in the Court of Session: and indeed it would have been useless for them to have attempted a defence, for, when the body of dacoits escaped, these two men were locked into the room in which they were, and were kept there until the police came. Pirbhu was armed with a blunderbuss, which, in firing, burst. He has been sentenced to death, and most rightly sentenced. We dismiss his appeal, and, confirming the conviction and the sentence of death, direct that the sentence be carried into effect.

As to the other men, the evidence clearly shows that they took part in the commission of this dacoity. It appears to us that Nathu Singh, the informer, gave a true account of what took place and spoke truly as to these appellants. His evidence is corroborated as to each of the appellants by one or more witnesses whose truthfulness and accuracy we have no reason to doubt. There is one witness for the prosecution who was called in the Court of Session, on whose evidence we do not rely, and that is Dalla, who identified all the accused at the Sessions trial. All these men, except Pirbhu,

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Gobind and Khimmi, were sentenced to transportation for life. We think the Sessions Judge adopted a very lenient course in merely passing a sentence of transportation on these men. It was a most daring dacoity, and the dacoits were determined to carry it out regardless of life. Gobind and Khimmi have been sentenced to ten years' rigorous imprisonment. As to Gobind, if the case had been tried by us, he would assuredly have been sentenced to transportation for life. There may be a good reason in the case of Khimmi, in view of his youth, why a sentence of ten years was sufficient. We may mention that in arriving at our conclusion we have not relied on the statements of Pirbhu and Kishan, as they, having pleaded guilty, were not on their trial. Nor have we placed any reliance on the dying statement of Kirat Singh. It is not necessary to go into the matter, but we may say that we consider that his statement was not admissible in evidence.

Some of the appellants plead that their witnesses were not examined. So far as we can judge from the English record, they did not call any witnesses at their trial. As, however, it is a frequent ground of appeal that the Court of Session has refused or omitted to examine witnesses for the defence, it would be advisable for Sessions Judges to state specifically in their record whether or not the accused had present witnesses, and whether or not the accused refused to call witnesses or elected to call some, and whether the witnesses whom he elected to call were examined. We dismiss these appeals.

[See also *Queen-Empress v. Pahuji* (1)—ED.]

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April 25.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

NARAINI KUAR (PLAINTIFF) v. MAKHAN LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, ss. 403, 409—Application for leave to sue in forma pauperis—Refusal of application—Institution of regular suit—Limitation.

When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full court-fee, such suit dates.

* First Appeal No. 47 of 1894, from a decree of Maulvi Muhammad Mazhar Hussain Khan, Subordinate Judge of Mainpuri, dated the 23rd December 1893.

(1) I. L. R., 19 Bom., 195.

for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispaupered.

THE facts of this case are fully stated in the judgment of the Court.

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Pandit *Baldeo Ram Dave* for the appellant.

Mr. *T. Conlan* and Pandit *Moti Lal* for the respondents.

EDGE, C. J., and BANERJI, J.—This was a suit for possession, and the plaintiff claimed by right of inheritance to her father. Her father died on the 18th of October 1879, and on the 21st of September 1891 the plaintiff presented an application, under s. 408 of the Code of Civil Procedure, for permission to sue as a pauper. On the 21st of November 1891 the Court made an order, under s. 409 of the same Code, refusing the plaintiff's application to sue as a pauper. The same Court gave the plaintiff one week within which to pay into Court the full stamps for a non-pauper's suit. Neither the Code of Civil Procedure nor the Court-Fees Act seems to have authorized that latter order of the Court below giving a week's time. The order could not have been made under s. 28 of the Court-Fees Act, inasmuch as the application to sue as a pauper was sufficiently stamped and there was no insufficiently stamped document before the Court on that application. On the 28th of November 1891 the plaintiff filed in Court the stamps necessary for a non-pauper's suit. The Subordinate Judge dismissed the suit on ground of limitation. He was of opinion that the suit could not be considered as instituted until the necessary stamps required by the Court-Fees Act had been filed along with the plaint. He also found that twelve years prior to the payment of those stamps into Court adverse possession had been taken, and consequently twelve years' limitation had expired before the 28th of November 1891. Pandit *Baldeo Ram*, on the question of the construction of Act No. XIV of 1882, has relied on the decision of the Privy Council in *Skinner v. Orde* (1).

(1) I. L. R., 2 All., 241.

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The Subordinate Judge thought that that case did not apply, as in that case, before any adverse order had been made on the application for leave to sue as a pauper, the requisite stamp had been filed, whereas in the present case the stamps requisite for a fully stamped suit had not been filed in Court until after the order of refusal under s. 409 of the present Code of Civil Procedure had been made.

It appears to us that the present Code of Civil Procedure makes a distinction between what is to happen in the case of an order being made under s. 409, refusing permission to the applicant to sue as a pauper, and the case of an order dispauperising a person already having permission to sue as a pauper. In the case of an order dispauperising a plaintiff, the Court, under s. 412, must make an order on the plaintiff to pay the court fees which would have been paid if he had not been permitted to sue as a pauper, and the presumption is that on payment of those court fees the dispauperised plaintiff could continue his suit as of the date on which it was first instituted. It is obvious from s. 413 that when an order of refusal under s. 409 is made, the suit cannot be continued as of its original institution. When an order under s. 409 is made there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by Government in opposing his application for leave to sue as a pauper, is allowed by that section the liberty of instituting a suit in the ordinary manner in respect of such right as he may have. That section satisfies us that under this Code, upon an order of refusal under s. 409, the proceedings instituted under s. 403 come to an end, and if the applicant for leave to sue as a pauper wishes to proceed with the vindication of his rights, he must sue in the ordinary course, and of course the date of the institution of that suit would not be the date of the presentation of the application for leave to sue as a pauper, but would be the date on which the suit was instituted. We are bound to hold that this suit was instituted for the purposes of limitation on the 28th of November 1891, and not before.

The plaintiff had endeavoured to show that Makhan Lal and Ram Dyal did not take possession of any kind, much less adverse

possession, until Magh or Phagun following the death of the plaintiff's father in October 1879. Magh and Phagun were respectively the January and February following the death. We must look to what was the position of affairs when Jagan Nath died. Jagan Nath had been carrying on an extensive business, he likewise had a zamindari, and the kharif rents would fall due in November and December, and it is not pretended on behalf of the plaintiff that she, or anyone on her behalf, took possession on the death of her father. At the time when her father died Ram Dyal was living with him and Makhan Lal was living next door. In our opinion the probabilities are that Ram Dyal and Makhan Lal immediately on the death of Jagan Nath took possession of his mercantile business and entered into occupation of his lands, shops and zamindari. One of the witnesses relied on by the plaintiff says that Makhan Lal and Ram Dyal took possession of the houses and shops immediately on the death of Jagan Nath.

We think the circumstances make it probable that they did take possession, and the evidence on the part of the defendants that possession was so taken is more reliable than the evidence on behalf of the plaintiff.

We hold the suit time-barred at the time when it was instituted and we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Parkitt.

JHABBU SINGH (APPLICANT) v. GANGA BISHAN (OBJECTOR). *

Act No. VIII of 1890 (Guardian and Wards Act)—Joint Hindu family—Appointment of guardian of property of minor.

It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *Firs-pakhappa v. Nilgangava* (1) and *Siam Kwar v. Mohanunda Sahoy* (2) referred to.

* First Appeal No. 9 of 1895, from an order of H. F. D. Pennington, Esq., District Judge of Fatehgarh, dated the 9th January 1895.

(1) I. L. R., 19 Bom., 309.

(2) I. L. R., 19 Calc., 301.

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THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal* and Mr. *Hudson* for the appellant.

Mun-hi *Madho Prasad* for the respondent.

BURKITT, J.—In this case it is admitted that the appellant and the father of the minor were the sons of one father, though by different mothers. I do not comprehend what the learned Judge of the Court below means when he describes them as “foster brothers.” The status of the family at present is that of a joint Hindu family possessed of property as such. The presumption of law to that effect is particularly strong in the case of brothers. No allegation of severance or partition between the brothers was made by the respondent. The only thing he said was that they were not on good terms with one another, and occupied separate houses, a matter which is quite consistent with their constituting a joint and undivided family. The minor having taken his father’s position in the family, and there being no allegation of any partition or severance after the death of the minor’s father, it is clear that the minor and his uncle, the appellant, are members of a joint undivided family possessed of property as such.

It is not alleged that the minor possesses any property or any interest in any property other than his interest in the joint property of the family. That being the case, I am of opinion that under the Guardian and Wards Act (VIII of 1890) the Court below had no power to appoint a guardian of the minor’s property. It was so held by a Full Bench of the Bombay High Court in the case of *Virupakshappa v. Nilgangava* (1) and by the Calcutta High Court in the case of *Sham Kuar v. Mohanunda Sahoy* (2).

In the rule of law laid down by those Courts, and in the reasons given for it, I fully and without reserve concur. Adopting that rule, I, as far as the present appeal is concerned, allow the appeal and discharge the order appointing the respondent, Ganga Bishan, to be guardian of the property of the minor. But at the same

(1) I. L. R., 19 Bom. 309.

(2) I. L. R., 19 Calc., 301.

time I see no reason for varying that part of the order which appoints Ganga Bishan to be the guardian of the person of the minor. That portion of the order of the lower Court will stand. As appellants have partly succeeded and partly failed, I make no order as to costs.

Order modified.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

KALAVATI (PLAINTIFF) v. CHEDI LAL AND OTHERS (DEFENDANTS).*

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May 2.

Civil Procedure Code, s. 462—Minor—Circumstances necessary to make a compromise by a guardian or next friend on behalf of a minor binding on the minor.

In order to make an agreement or compromise to which s. 462 of the Code of Civil Procedure applies a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.

From the mere fact that the Court passed the decree in accordance with the compromise it cannot be inferred that any of those steps preliminary and necessary to the making of the decree have been taken by the Court.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, Munshi Ram Prasad and Babu Durga Charan Banerji for the appellant.

Babu Jogindro Nath Chaudhri for the respondents.

EDGE, C. J., and BANERJI, J.—This is an appeal from the decree of the Subordinate Judge of Aligarh. The plaintiff, who is a minor, is, through her guardian, the appellant. The respondents are defendants in the suit. The parties, after the suit had been instituted, agreed to a compromise. They filed the compromise in the

* First Appeal No. 126 of 1894, from a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 28th February 1894.

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Court, and the compromise having been verified, the Subordinate Judge made a decree in the terms of compromise and thus disposed of the suit. It is no doubt the duty of the Court under s. 375 of the Code of Civil Procedure to pass a decree in accordance with any lawful compromise which may be made by the parties, so far as that compromise relates to the suit. But in order to see what a lawful compromise is, where a minor is concerned, we must turn to s. 462 of that Code. That section was enacted for the protection of minors, and it positively forbids any next friend or guardian for a suit from entering into any agreement or compromise on behalf of a minor in reference to a suit in which such friend or guardian acts as such friend or guardian without the leave of the Court. The section would be entirely inoperative to afford any protection for minors in such cases if it meant that the Court was not to exercise, and was not bound to exercise, a judicial discretion as to the propriety, in the interests of the minor, of the agreement or compromise. In order to make an agreement or compromise to which s. 462 applies a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. Further, the Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court. Indeed, looking at the proceedings in this case and the orders passed, it is obvious that the Court never considered the question as to whether the compromise was a proper one in the interests of the minor, and the only point to which the Court directed its attention was the acknowledgment by the parties that the agreement had been made.

We allow this appeal, and, setting aside the decree of the Court below, remand the suit under s. 562 of the Code of Civil Procedure to the Court below, to be decided on the merits. It will be competent for the guardian to apply to the Court for permission to compromise the suit, and if the Court grants leave, after considering the question of the interests of the minor, and the parties agree to the compromise, it will then be the duty of the Court to make a decree in accordance with s. 375 of the Code of Civil Procedure. If the suit is tried out, the Court must take special care to see that justice is done to the minor, if she has any title. The costs of this appeal will abide the event.

Appeal decreed and cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MEWA KUAR (DEFENDANT) v. BANARSI PRASAD (PLAINTIFF).*

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May 8.

Civil Procedure Code, ss. 43, 44—Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.

Where a plaintiff sued for possession of immovable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and, having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. *Held* that the claim for mesne profits for the period above mentioned was barred by s. 43 of the Code of Civil Procedure. *Lalji Mal v. Hulasi* (1) and *Venkoba v. Subbanna* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad* for the appellant.

Mr. *D. N. Banerji* and Pandit *Sundar Lal* for the respondent.

EDGE, C. J., and BANERJI, J.—In this suit the plaintiff claimed mesne profits. Part of the period for which the mesne profits were claimed was from the 31st of January 1889 to the 23rd of Decem-

* First Appeal No. 63 of 1894, from a decree of Munshi Mata Prasad, Subordinate Judge of Bareilly, dated the 1st December 1890.

(1) I. L. R., 3 All., 600.

(2) I. L. R., 11 Mad., 151.

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ber 1889. The plaintiff got a decree and the decree gave him interest on the *mesne* profits at the rate of Rs. 12 per cent. per annum. The defendant has appealed from that decree.

The first point taken on behalf of the defendant was as to the plaintiff's title. That point is not open to the defendant. She is bound by the decree in the previous suit, which established against her the title of the plaintiff to the land in question from the 31st of January 1889.

The second point was as to the amount of interest allowed on the *mesne* profits. Twelve per cent. per annum is a little high, but not an unreasonable nor an unusual rate of interest in these provinces. On the question of interest we see no reason for interfering with the discretion of the Court below.

The next point raised for the appellant is as to the plaintiff's right to claim *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. In the previous suit, which was a suit for ejectment on a forfeiture, rent was claimed up to the 31st of January 1889. That was the date on which the forfeiture was alleged to have taken place, the date on which the plaintiff's right to possession was disputed, and from which he alleged that this defendant and the other defendant wrongfully held possession against him. It has been contended on behalf of the defendant that the plaintiff's claim for *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 is barred by s. 43 of Act No. XIV of 1882. In support of that contention a Full Bench ruling of this Court—*Lalji Mal v. Hulasi* (1)—has been cited. On the other hand, on behalf of the plaintiff-respondent it is contended that the effect of clause (a) of s. 44 of Act No. XIV of 1882 is to differentiate the cause of action for the recovery of land from the cause of action for the recovery of *mesne* profits in respect of that land, and the decision of the Calcutta High Court in *Lalessor Babui v. Janki Bibi* (2) following a Full Bench

(1) I. L. R., 3, All., 660.

(2) I. L. R., 19 Calc., 615.

ruling of that Court was relied upon. The wording of ss. 43 and 44 of Act No. XIV of 1882 is not happy and suggests confusion. In s. 43 the word "claim" is treated as something arising out of a "cause of action" and as distinct from the term "cause of action." When we come to s. 44 we find that "cause of action" and "claim" are treated as synonymous. Whether it was intended by s. 44, which provides a rule of procedure, to enact that a claim for *mesne* profits and a claim to recover the land in respect of which the *mesne* profits are claimed, cannot arise out of the same cause of action, we do not know. It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim *mesne* profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that that clause (a) of s. 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen. What the first paragraph of s. 43 enacts, so far as it is necessary to refer to it, is that—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." In the former suit the cause of action in respect of which the claim for possession was made was, so far as the present defendant was concerned, the forfeiture entitling the plaintiff to possession and the wrongful keeping of the plaintiff out of the possession and enjoyment of the property. Now what was the cause of action for the *mesne* profits claimed from the defendant-appellant? It was stated briefly that, the plaintiff being entitled by reason of the forfeiture to possession, this defendant wrongfully withheld possession from the plaintiff and deprived him of the profits of the land. It appears to us that there were here not two causes of action, but one and the same cause of action, and that the same cause of action which supported the plaintiff's claim for possession in the previous suit supports his claim for *mesne* profits in the present suit, so far as the period between the 31st of January 1889 and the 23rd of December 1889 is concerned. The claim for possession and the claim for *mesne* profits in respect of the period between the

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31st of January and the 23rd of December 1889 were claims which the plaintiff was in our opinion entitled to make in the former suit against the defendant in respect of the cause of action on which he sued in the former suit within the meaning of s. 43. The previous suit was instituted on the 23rd of December 1889. Consequently in respect of the cause of action upon which the present plaintiff succeeded in obtaining a decree for possession in that suit he was in that suit entitled, if he had made it, to support his claim for *mesne* profits between the date of the wrongful withholding of possession, namely, the 31st of January 1889, and the date when he brought that suit, namely, the 23rd of December 1889. This view is supported by the Full Bench decision of this Court referred to above, and by a decision of the Madras High Court in *Venkoba v. Subbanna* (1).

We hold that the plaintiff is, by reason of s. 43 of Act No. XIV of 1882 and the previous suit, disentitled to claim *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 in this suit. As the parties cannot agree as to the amount of *mesne* profits to be deducted from the decree of the Court below as the result of our judgment, we remand this case to the Court below under the provisions of s. 566 of the Code of Civil Procedure to find what are the *mesne* profits to which the plaintiff is entitled after excluding the *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. Ten days will be allowed for filing objections on the return to our order. The Court below may take such further evidence as may be necessary.

Cause remanded.

(1) I. L. R., 11 Mad., 151.

FULL BENCH.

1895
June 17.

*Before Sir John Edg, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji, Mr. Justice Burdett, and Mr. Justice Aikman.*

BHAWANI PRASAD (DEFENDANT) v. KALLU AND OTHERS (PLAINTIFFS).
*Act No. IV of 1882 (Transfer of Property Act), s. 85—Mortgage—Suit for sale
on mortgage—Non-joinder of parties—Joint Hindu family—Suit for sale on
mortgage by father without joining sons.*

When a plaintiff mortgagee institutes a suit for sale under s. 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. So *Held* by EDGE, C. J., KNOX, BLAIR, BURDETT and AIKMAN, JJ., (*Dissentiente BANERJI, J.*).

Held, by BANERJI, J., that where, under the circumstances above described, a decree has been obtained against the father alone without joining the sons, the sons cannot, in the suit brought by them, plead against the operation of the decree on their interests any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve them from liability for their father's debt had they been made parties to the mortgagee's suit.

The facts of this case are as follows:—

One Pemi, with his five sons, formed a joint Hindu family, which owned as ancestral property a share in a certain grove. Pemi, without the assent or knowledge of his sons, mortgaged the said share to Bhawani Prasad. The mortgagee brought a suit against Pemi upon the mortgage executed by him, to which suit the sons were not made parties, and obtained a decree against Pemi for sale of the property. Thereupon three of the sons of Pemi, Kallu, Zorawar and Khiali, sued for a declaration that the decree obtained by Bhawani Prasad did not affect their interests in the property covered by it, alleging that they were no parties to the suit, and had received no benefit from the loan in respect of which the mortgage was executed. The Court of first instance (Munsif of Bareilly)

* Second Appeal No. 776 of 1893, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 27th April 1893, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bareilly, dated the 15th December 1892.

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dismissed the plaintiffs' suit. The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Bareilly), holding that the effect of section 85 of the Transfer of Property Act was to render the decree ineffectual as against the shares of the sons, decreed the appeal, and gave the plaintiffs the declaration claimed. The defendant, mortgagee, appealed to the High Court.

The appeal came on for hearing before a Bench consisting of Knox and Blair, JJ., and it was argued that the point in issue was concluded by the judgment of the Court in the case of *Badri Prasad v. Madan Lal* (1). But as it was contended on behalf of the appellant that the ruling referred to above was not necessarily decisive of the particular point, and that the passages relied upon by the respondents might possibly be considered as *obiter*, the appeal was referred to the Chief Justice for the appointment of a Bench of three or more Judges for its decision. Upon this reference a Bench consisting of Blair, Banerji and Burkitt, JJ., was constituted, which Bench in its turn made the following order of reference to the Full Bench of the whole Court :—

"We refer the following question for decision to a Full Bench of the whole Court :—

"When a plaintiff mortgagee institutes a suit for sale under s. 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests in the mortgaged property he has notice, and obtains a decree and an order absolute for sale against the father only, can the sons successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell their interests in the mortgaged property in execution of that decree, the sole ground of their suit being that they were not parties to the suit of the mortgagor?"

Babu *Jogindro Nath Chaudhri* for the appellant.

Pandit *Sundar Lal* for the respondents.

On this reference the following judgments were delivered by the Full Bench :—

(1) I. L. R., 15 All., p. 75.

BANERJI, J.—The circumstances which have given rise to the suit in this case are these. One Pemi, with his five sons, formed a joint Hindu family governed by the Mitakshara law, owning a share in a grove which has been found to be the ancestral property of the joint family. He and his brother, since deceased, borrowed some money from Bhawani Prasad, the appellant, and for the amount so borrowed they executed a simple mortgage of the grove in favour of Bhawani Prasad. Bhawani Prasad brought a suit on his mortgage, making Pemi and the legal representative of his brother the only defendants to the suit, and on the 23rd of February 1892 he obtained a decree for the sale of the mortgaged property under s. 88 of the Transfer of Property Act, 1882. On his applying under s. 89 of the Act for an order absolute for sale, three of the sons of Pemi, the respondents to this appeal, objected to the making of the order. Their objection having been disallowed, they brought the present suit claiming a declaration that their interests in the mortgaged property were exempt from liability for the decree. The main ground of their claim was that they were not parties to the suit in which the decree was passed. They did not deny the fact of the debt, and they did not allege that the debt was incurred by Pemi for immoral or impious purposes. The Court of first instance dismissed the suit, on the ground that the plaintiffs had not even asserted, much less proved, that the debt of their father was tainted with immorality. On appeal, the lower appellate Court set aside the decree of the Munsif and decreed the claim, holding that, as the plaintiffs were not joined as parties to Bhawani Prasad's suit, the decree obtained by him was not capable of execution as against their interests in the mortgaged property.

The correctness of this decision has been assailed in this second appeal, and the question which we have to consider upon this reference to the Full Bench is substantially this:—Whether the plaintiffs can succeed in their suit on the solitary ground that they were not parties to Bhawani Prasad's suit against their father, or they must also establish, either that their father did not incur any debt, or that the debt was one which by reason of their pious obligation as Hindu sons they were not legally bound to pay.

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The question is one of difficulty, and my difficulty in considering it has been enhanced by reason of certain observations contained in the judgment of the learned Chief Justice in the case of *Badri Prasad v. Madan Lal* (1) which, it is said, have practically decided it. At page 83 the learned Chief Justice is reported to have said :—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882, came into force, having notice that the sons had an interest in the property had omitted to join them, they could have obtained a decree against the father's interest only and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." These observations are not in my judgment conclusive of the question which we have to decide upon this reference. This particular question did not arise nor was it involved in the case of *Badri Prasad v. Madan Lal*, and could not consequently be determined in that case. The questions which were considered and decided in that case were, first, whether "the sons in a joint Hindu family could be sued along with their father upon a mortgage bond given by the father alone," and, secondly, what was the nature of the decree to which the mortgagee was entitled. In dealing with the second question the learned Chief Justice made the observations to which I have referred above, and it seems to me that they were only some of the reasons which induced him to make the decree which was passed in that case. As such, they can only be treated as expressions of opinion and not as a judicial determination of the question now under consideration. My learned brothers Knox and Blair, or either of them, apparently held this opinion when they referred the case to a Bench of three Judges, and had probably some hesitation in accepting the *dictum* of the learned Chief Justice, otherwise there was evidently no reason for their making that reference. At the hearing of the case before my brothers Blair and Burkitt and myself, I understood those learned Judges to be of the opinion that the present question was not concluded by the authority of the Full Bench ruling referred to above. The question is therefore *res integra* and must be decided on its own merits. I

(1) I. L. R., 15 ALL., 75.

may add that in the view which I take of this case, the observations of the learned Chief Justice leave the present question wholly untouched.

There can be no doubt that as the plaintiffs to this suit had an interest in the property comprised in the mortgage made in favor of Bhawani Prasad, they were, under s. 85 of Act No. IV of 1882, necessary parties to the suit brought by Bhawani Prasad to enforce that mortgage. It seems that, by reason of the omission to implead them, Bhawani Prasad's suit was, according to the ruling of the majority of the Full Bench in *Matadin Kasodhan v. Kazim Husain* (1), liable to dismissal. It may also be that if he could at all obtain a decree for sale in that suit, that decree should have been confined to the interests of the father only. He has, however, obtained a decree for the sale of the whole of the mortgaged property; and the question we have to consider is—what was the effect of the omission to join as parties the sons of the mortgagor upon the decree so obtained and upon the interests of the sons in the mortgaged property?

Ordinarily every person who has the right to redeem a mortgage should be allowed an opportunity to exercise that right, and, if such opportunity is not afforded to him, he continues to retain that right until it becomes barred by the operation of the law of limitation. If a sale be held before he is foreclosed of his right of redemption, the sale cannot pass to the purchaser his interests in the property. The consequence therefore of an omission to join in the mortgagee's suit for sale persons who were necessary parties to it is, that the right of redemption of those persons is preserved to them, and that they are entitled to exercise that right until it has been foreclosed by suit or has become barred by efflux of time.

A Hindu son governed by the Mitakshara law, however, stands on a somewhat different footing. It has been established by the decisions of their Lordships of the Privy Council that it is the pious duty of the son to pay his father's debts not incurred for purposes of immorality out of the ancestral estate in which the son has an interest, and the obligation attaches to the son equally whether

(1) I. L. R., 13 All., 432.

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the debts are or are not secured by a mortgage of the whole of the ancestral estate. It is also an established proposition that an alienation of the ancestral estate made by the father in consideration of such debts is binding on the interests of the son, and that an auction sale of the ancestral estate effected at the instance of a creditor of the father for the realisation of such debts passes to the purchaser the interests of the son also. In *Nanomi Babuasin v. Modhun Mohun* (1) their Lordships said :—"The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an ancestral debt or against the creditor's remedies for their debts if not tainted with immorality." And it was held by the Full Bench of this Court in *Badri Prasad v. Madan Lal* (2) that they cannot do so even in the lifetime of the father. The only grounds on which a son can escape liability for debts incurred by his father, or can claim that a sale of the ancestral estate effected for the realisation of the debts of the father did not affect the son's interests in the estate, are that the debts were not, as a matter of fact, incurred by the father, or that they were not subsisting debts, or that they were such as by reason of his pious obligation as a Hindu son he was not liable to pay. These being the only grounds on which a son can be relieved of his liability for his father's debts, he may set them up in answer to the creditor's suit, if he be made a party to that suit, or he may bring a suit of his own, if he was not impleaded in the suit of the creditor. But in either case those are the only grounds available to him, and they are available to him both before sale or after a sale has taken place at the instance of the creditor. Their Lordships of the Privy Council said in *Nanomi Babuasin v. Modhun Mohun* (1) :—"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor

(1) I. L. R., 13 Calc., 21.

(2) I. L. R., 15 All., 75.

might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own."

Now, has the Transfer of Property Act, 1882, in any way superseded or modified the principles of Hindu law thus enunciated by their Lordships of the Privy Council? Unless there are clear and unmistakable indications in the Act itself of the intentions of the Legislature on the subject, one should hesitate to answer that question in the affirmative. Such indications are, in my judgment, not afforded by the provisions of s. 85. In *Namdar Chaudhri v. Karam Raji* (1) Mr. Justice Straight said, with reference to that section, with the concurrence of Mr. Justice Tyrrell :—"Section 85 of the Transfer of Property Act which is now in force only applies a principle which was long before recognised by the Courts of this country, and is a principle to which, in justice, equity and good conscience, it seems to me those Courts were bound to give effect." In this view I also fully concur, and this seems to me to be the inference which arises from the following observations of the learned Chief Justice in *Matadin Kasodhan v. Kazim Husain* (2). At page 453 he said :—"The decisions to which I have referred show, and I think rightly, that, as well before as since Act IV of 1882 came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage the other mortgagees, whether prior or subsequent, were necessary parties." The same inference arises from most of the cases collected in the judgment of the learned Chief Justice in that case. In my opinion s. 85 only formulates what has always been the rule of procedure, namely, that "all persons whose interests are sought to be prejudicially affected by a suit should be made parties, unless their interests are sufficiently represented and protected by other parties to the suit. (Mitford on Pleadings, pp. 163 and 164.) And it is because that rule was not strictly observed by

(1) I. L. R., 13 All., 315.

(2) I. L. R., 13 All., 432.

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the Courts, especially in these provinces, and endless litigation was the consequence, that the Legislature seems to have enacted s. 85 to emphasize and enforce the rule. That section does not, in my judgment, lay down any rule of substantive law. There is therefore no warrant for the contention that a decree obtained in violation of the provisions of that section is a void decree. Such a decree is only voidable at the instance of the persons who were not parties to the suit in which it was passed. As s. 85 does not enunciate a new rule of procedure, the enactment of that section cannot and does not affect the rule laid down by their Lordships of the Privy Council, and that rule applies as much to decrees obtained against a father after the passing of Act No. IV of 1882, as to those obtained before the passing of that Act. As I have said above, a Hindu son to whom the Mitakshara law applies cannot, according to the decisions of the Privy Council, avoid the effect of a decree obtained against his father except on the grounds that the debt in respect of which the decree was passed was not in fact incurred by the father, or, if it was incurred by him and was a subsisting debt, that it was incurred for an immoral and impious purpose. There is no other ground under the Hindu law on which he can avoid liability for the obligation which that law casts on him in respect of his father's debts. Those are the only grounds on which he could have resisted the creditor's suit had he been made a party to it, and as the effect of the omission to make him a party to the creditor's suit was not to render the decree passed in that suit absolutely null and void, but only to relegate the son back to the position in which he was before the suit was brought, I fail to see how he can, after a decree has been passed, urge any plea in respect of the debt which he could not have put forward before the decree. It has been contended that a decree for sale in respect of a mortgage debt stands on a different footing from the debt itself, and that, although a son may be bound to pay a debt to which he was not a party, he can claim exemption from liability for the decree passed in respect of that debt on the sole ground that he was not a party to the suit in which the decree was passed. Assuming this contention to be correct, it must, to be consistent, apply, in the case of a Hindu

son governed by the Mitakshara, as much to a simple decree for money as to a decree for the sale of mortgaged property. Both these descriptions of decrees are, it is true, not alike in all their incidents, but their effect as judgment-debts due by the father on the interests of the son in joint ancestral property is, according to their Lordships of the Privy Council, the same. In the case of persons other than Hindus governed by the Mitakshara, a sale held in execution of a simple decree for money obtained against the father alone cannot pass the interests of the son in property owned jointly by the father and the son, but, in the case of a son to whom the Mitakshara law applies, it cannot, in the face of the decisions of the Privy Council, be contended for a moment that the son can avoid the effect of a sale held in execution of such a decree on his own interests in the ancestral property on the ground that he was not a party to the suit and the execution proceedings. If he cannot do so in respect of a sale held in execution of a simple money decree, he is equally disentitled to do so in respect of a sale held in execution of a decree for sale under a mortgage. It has been held by a Full Bench of this Court in *Fateh Choud v. Muhammad Bakhsh* (1) that a decree for sale under s. 55 of Act No. IV of 1852 is "one form of a decree for payment of a debt" (at page 265). Where such a decree has been passed against the father of Hindu sons governed by the Mitakshara law it is a decree for the payment of a debt of the father, and the obligation which attaches to a son in respect of all debts of the father not tainted with immorality attaches to this debt also. A son cannot therefore be in a better position in respect of a decree for sale than he would be in respect of any other debt of the father. The son's obligation has, as held by their Lordships of the Privy Council, reference only to the nature of the debt, and is unaffected by the procedure resorted to by the creditor for the enforcement of the debt. It is imposed on him by law by reason of his being the son of his father, and not by reason of a decree having been passed against the father; and, if the debt to which the decree obtained against the father relates is a debt which is binding on the son by reason of his pious obligation as a Hindu son, the

(1) I. L. R., 16 All., 259.

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decree so obtained is binding on the interests of the son also. I am not aware of any authority, nor has any been cited to us, for the contention that during the lifetime of the father it is necessary for a creditor of the father to establish the son's obligation by a suit against the son. The ruling in *Lachmi Narain v. Kunji Lal* (1) which was not cited at the hearing, but which is supposed to have a bearing on the present question, is not inconsistent with what I have said above. That was a case in which a simple decree for money had been obtained against the father, and after the death of the father execution of the decree was sought against the sons under s. 234 of Act No. XIV of 1882, as his legal representatives, by attachment of joint ancestral property which had not been attached in the lifetime of the father. It was held that as the property had passed to the son by right of survivorship it was not assets of the deceased father in the hands of the sons as his heirs or legal representatives, and could not be attached as such. It was further held that the liability of a legal representative under s. 234 of Act No. XIV of 1882, to the extent of the assets of the deceased judgment-debtor which had come into his hands and had not been duly disposed of, stood on a principle different from that of the pious obligation of a Hindu son to pay his father's debts not tainted with immorality, and that the question of such pious obligation could not be raised in and determined by the Court executing the decree against the sons as the legal representatives of their father. That case was decided upon a principle perfectly distinct from that which is applicable to this case, and there is not the remotest analogy between that case and this. The fact seems to have been overlooked that in the case before us the question of the liability of the interests of the plaintiffs in joint ancestral property for the debt of their father, in respect of which Bhawani Prasad has obtained his decree, has been raised not in execution of that decree, but in a suit brought by the sons. Such a suit must, like every other suit, stand or fall with the strength or weakness of the title of the plaintiffs themselves, and, as the sons of a Hindu father governed by the Mitakshara law are not entitled to claim exemption from liability

(1) I. L. R., 16 All., 449.

for their father's debts on any grounds other than those laid down by the Privy Council, they cannot succeed in their suit simply on the ground that they were not parties to the suit of the creditor. Section 99 of Act No. IV of 1882 also cannot help the plaintiffs. All that s. 99 provides is that a mortgagee cannot bring to sale the property mortgaged to him otherwise than by instituting a suit for sale under s. 67, and that he cannot sell up a bare equity of redemption. A suit under s. 67 was brought by Bhawani Prasad the appellant, and he has obtained a decree for the sale of the mortgaged property. The circumstance of the plaintiffs not having been joined in that suit only leaves it open to them to try the fact or the nature of the debt in a suit of their own, as held by the Privy Council, or to exercise their right of redemption. In the case of a subsequent incumbrancer it was held in *Namdar Chaudhri v. Karam Raji* (1), which was a case under Act No. IV of 1882, that the result of the subsequent incumbrancer having been left out of the suit of a prior mortgagee, would be that his right to redeem the prior mortgage would remain unaffected. The rule in England as regards subsequent incumbrancers is thus stated in Coote on Mortgages, Vol. II, p. 1094:—"A mortgagee who brings an action of foreclosure or sale, whether he is first or any subsequent incumbrancer, and whether of a legal or equitable estate, must make every incumbrancer subsequent to himself a party to his suit, notwithstanding. With respect to incumbrances subsequent to the mortgage, but prior to the commencement of the action, the rule appears to be that the decree of foreclosure will bind all those who are parties to the action, but not the rest, and it is a general rule to make all such incumbrancers parties, and it seems indeed that they are necessary parties to the suit. And, consequently, a second mortgagee or other subsequent incumbrancer who is not a party to the action may, on payment of the first mortgage debt and costs, redeem the first mortgage after the decree obtained, although the first mortgagee had no notice of the other incumbrances at the time of the decree." It was conceded by Mr. *Sundar Lal* that, except in *Janki Prasad v. Kishen Dat* (2) no Court has held since the

(1) I. L. R., 13 All., 315.

(2) I. L. R., 10 All., 478.

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Transfer of Property Act, 1882, came into force in July 1882, that the consequence of the omission to join a subsequent incumbrancer in a prior mortgagee's suit is to confer on the subsequent incumbrancer any higher right than that of redeeming the prior mortgage. It is, however, not necessary to go into that question for the purposes of the present suit. In my judgment when a decree has been obtained against the father, whether in respect of a simple money debt or in respect of a mortgage of the ancestral property, his sons cannot by a suit of their own claim exemption of their interests in the property from liability for the decree on any ground other than that of the immoral nature of the debt, or the non-existence of the debt, or the operation of the law of limitation, and they cannot claim such exemption merely on the ground that they were not parties to the creditor's suit. In the case of a mortgage, if they were not parties to the creditor's suit for sale and they do not impeach the validity of the mortgage, they can only claim to be afforded an opportunity to redeem the mortgage, and thereby to discharge the father's debt, and this they are entitled to do both before sale and after a sale has taken place. Similarly, in the case of foreclosure of a mortgage by conditional sale to which Mr. *Sundar Lal* referred in his argument, if the sons were not parties to the mortgagee's suit, they can equally claim to redeem the mortgage; so that a Hindu son would not in respect of the right of redemption be in any case in a worse position than any of the persons mentioned in s. 91 of Act No. IV of 1882. Any other conclusion will lead to serious anomalies. In the case of an unsecured debt of the father not tainted with immorality, his creditor may bring to sale the whole of the ancestral estate, and such sale will pass the entirety of the estate to the purchaser, even when the sons were not parties to the creditor's suit; but, according to Mr. *Sundar Lal's* contention, in the case of a debt secured by a mortgage, if a decree be obtained without making the sons parties to the creditor's suit, the creditor will not be competent to sell up the interests of the sons and will be in a worse position than an unsecured creditor. Again, if the father chose to sell the ancestral estate in lieu of the amount of a mortgage of that estate effected by him for purposes which were not immoral or impious, there can be no

doubt that such sale would convey the interests of his sons also. But, according to Mr. *Sunder Lal's* contention, if the mortgagee, whose rights under the mortgage are not certainly inferior to those of the mortgagor, procured a sale of the mortgaged property by suit, without joining the sons in the suit, the sale would be limited to the interests of the father only. Further, if the mortgagee relinquished his rights as such and took a simple decree for money against the father alone, he would be entitled to sell up the interests of the sons also; but if he took a decree upon his mortgage he would not, according to the contention of the respondents, be entitled to obtain a sale of those interests. It is difficult to believe that the Legislature in enacting s. 85 of the Transfer of Property Act, 1882, intended to create such anomalies. It is said that the creditor will not be without his remedy, and that he will still be able to bring a suit against the sons to enforce his mortgage against their interests in the ancestral estate on the ground of their pious obligation to pay their father's debts. It cannot possibly be held that no remedy will be open to the creditor, as such a decision will render the rulings of their Lordships of the Privy Council on the question of the liability of Hindu sons in respect of their father's debts wholly nugatory. But, even assuming that a remedy will as it must, be still open to the creditor, the result will be to foster and bring about an increase of litigation, which it was undoubtedly the object of s. 85 to prevent. Every son whom a creditor of his father may have omitted to join in his suit against the father would be able to avoid and delay the sale of his interests in the ancestral estate by bringing a suit on the ground of such omission, although he might have nothing to urge in respect of his father's debts. If the father happened to have several sons, each of them might bring a separate suit of this kind. In such cases the creditor would have to bring suits against the sons to which the sons may have no answer. The result would be the institution of numerous suits which would otherwise have been wholly unnecessary. No doubt a mortgagee bringing a suit for the sale of ancestral property against the father should join as parties to his suit the sons of the mortgagor of whose interests he has notice, in order that the decree passed in the suit may be

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binding on the sons as a decree for the payment of their father's debt and future litigation may thus be avoided. If such a mortgagee violates the provisions of s. 85 of Act No. IV of 1882 by not impleading the sons, he may thereby run the risk of his suit being dismissed with costs for non-joinder of necessary parties. He may also run the risk of the decree for sale being confined to the interest of the father only. He undoubtedly runs the risk of the question of the fact and the nature of the debt being subsequently raised and reopened by the sons in a suit of their own. But where, as in this case, a decree has been obtained against the father alone without joining the sons, the sons cannot, in my judgment, plead against the operation of the decree on their interests any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve themselves from liability for their father's debt had they been made parties to the mortgagee's suit. I fail to see how the conclusion at which I have arrived can have the effect of rendering s. 85 practically inapplicable to Hindus governed by the Mitakshara law. On the contrary, the opposite view will, as I have shown above, not only militate against the rules of Hindu law, neutralise the effect of the several rulings of the Judicial Committee of the Privy Council, and create anomalies which the Legislature certainly never contemplated, but will also promote, in many cases, needless litigation contrary to the avowed object of s. 85 of Act No. IV of 1882. For the above reasons I would answer in the negative the question referred to the Full Bench, and I extremely regret that this conclusion is not, as I understand, in accordance with the views of my learned and honorable colleagues.

EDGE, C. J.—The plaintiffs, who are respondents to this appeal, were and are, with their father Pemi, members of a joint Hindu family, and, as such, were and are, with their father, co-parceners in certain ancestral property of the joint family. The defendant Bhawani Prasad, who is the appellant in this appeal, brought, upon a mortgage of the family property which had been made in his favor by Pemi, a suit, in 1892, for sale under chapter IV of the Transfer of Property Act, 1882 (Act No. IV of 1882). Although Bhawani Prasad had, when he brought this suit for sale, notice that the sons

of Pemi were interested in the property comprised in his mortgage, he did not make them parties to the suit. Notwithstanding that the sons of Pemi were not parties to that suit, Bhawani Prasad obtained a decree under s. 88 of the Transfer of Property Act, 1882, for sale of the joint family property, and attempted to execute that decree by sale of not only Pemi's interest in the joint family property, but the interests of the sons in that property. The sons of Pemi thereupon brought the suit in which this appeal has arisen, praying that their share in the joint family property might be exempted from sale in execution of Bhawani Prasad's decree. The sons did not allege, and in my opinion there was no necessity for them to allege in this suit, that the debt in respect of which Bhawani Prasad had obtained his decree had been tainted with immorality. I am further of opinion, for reasons which will appear later on, that an issue as to whether the debt upon which Bhawani Prasad obtained his decree for sale was or was not tainted with immorality would have been an irrelevant issue in this suit, in which the simple question is not—was that debt one which, owing to the pious duty of a Hindu son to pay his father's debts which are not tainted with immorality, the sons were under a legal obligation to pay? but is,—can that legal obligation be enforced by a suit for sale brought under chapter IV of Act IV of 1882, to which suit the sons were not parties? A simple decree for money can be made under the Code of Civil Procedure; it gives no priority to the decree-holder over other judgment-creditors of the judgment-debtor, and confers no right on a purchaser under it against mortgagees, except such right as the judgment-debtor had, namely, a right to redeem the mortgaged property. A decree for sale, on the other hand, can be made only under chapter IV of Act No. IV of 1882. It creates a lien, and gives priority over all holders of simple decrees for money, and settles the amount on payment of which a co-parcener or other person mentioned in s. 91 of that Act may redeem the mortgaged property, and if there are other mortgagees of the property, the priorities of redemption, and orders that if such amount be not paid by the defendant or defendants on or before a day to be fixed within a limited period by the Court, the property

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shall be sold. The purchaser under a decree for sale takes the property freed from all rights, mortgages and charges of parties to the suit for sale, and the parties to that suit must be all those persons having an interest in the property of whose interest the plaintiff in such suit has notice. It is obvious that the title which passes on a sale under a decree for sale is more certain, and consequently more valuable, than is the title which passes on a sale in execution of a simple decree for money, and that a decree for sale is a more valuable security to the creditor than is a simple decree for money. In order to prevent the recurrence of cases of gross hardship, and so far as possible to remove all grounds for endless and exhausting litigation theretofore the rule, the Legislature, in s. 99 of Act No. IV of 1882, enacted that no mortgagee should be entitled to bring the mortgaged property to sale except by a suit under s. 67 of that Act. One of the suits which may be brought under s. 67 is a suit for sale. Section 67 and s. 85 are two of the sections included in chapter IV of that Act. Section 85 is as follows:—“Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a mortgage *must* be joined as parties to any suit under the chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.” Section 437 of the Code of Civil Procedure enacts that:—“In all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.” The reference in s. 85 of Act No. IV of 1882 to s. 437 of the Code of Civil Procedure is instructive as showing the cases, and those cases only, in which, for the purposes of a suit under chapter IV of Act No. IV of 1882, a party to a suit under that chapter may be treated as representing a person interested in the mortgaged property who is not a party to the suit. I have not yet heard any one suggest even in the wildest arguments that the father in a joint Hindu family is, as such, a trustee,

executor or administrator, within the meaning of s. 437 of the Code of Civil Procedure, of his son, particularly if that son is alive and *in jure*. Consequently we may dismiss from the consideration of this case the suggestion that Pemi in Bhawani Prasad's suit for sale of the interests of the sons in the family property represented his sons or could have been treated by Bhawani Prasad or by the Court in that suit as representing them for the purposes of s. 85 of Act No. IV of 1882. This will clear away one fog which at the hearing to some extent obscured the question of law before us.

As I understand sections 59, 67 and 85 of Act No. IV of 1882, the Legislature intended that no mortgagee should bring the mortgaged property to sale except by a suit for sale under section 67, and in that suit all persons interested in the mortgaged property of whose interest the plaintiff had notice must be parties, except when the title to the property is vested in a trustee, executor or administrator, in which case the trustee, executor or administrator must be a party to the suit, and may, as such trustee, executor or administrator, represent for the purposes of the suit and of any decree which may be passed in it the persons beneficially entitled to the property. The word "must" is one of the strongest words of compulsion which a Legislature can employ, and Courts are, in my opinion, bound to give effect to it, and not to ignore it and its significance. The less significantly imperative word "shall" of section 541 of the Code of Civil Procedure has been held by all the Judges of this Court to be so imperative as to preclude a Court from accepting a memorandum of appeal which is not accompanied by a copy of the decree appealed against, and from treating the presentation of a memorandum of appeal which is not accompanied by a copy of the decree as a valid presentation of an appeal.

In order to prevent the point of law which we have to determine being obscured and to prevent confusion of thought and of legal principles, I propose now to state concisely what the point of law is: it is this—does the pious duty which makes it incumbent on a Hindu son to pay out of his share in the joint family property the debts of his father which are not tainted with immorality render the son's share in the family property liable to be sold in execution of a

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decree for sale passed against his father in a suit for sale under chapter IV of the Transfer of Property Act, 1882, brought in violation and contravention of the Statute, and to which suit the son was not a party, unless the son pleads that the debt in respect of which the suit was brought was tainted with immorality? In other words, does the pious duty estop the son from showing that the decree as against the property and his father creating the judgment-debt was obtained by the decree-holder in contravention and violation of the law?

There are some points upon which we all are agreed. They are these:—It has not been disputed at the Bar or on the Bench, and we all are agreed, that it is the pious duty of a Hindu son to pay such debts of his father as are not tainted with immorality. That pious duty creates a legal obligation in the son which can be enforced by a suit against the son for sale under chapter IV of Act No. IV of 1882, or by a suit for a simple decree for money to the extent of the family property in his hands, and can also be enforced in execution of a simple decree for money obtained in a suit brought in accordance with law against the father, although the son was not a party to the suit, provided that attachment of the family property was obtained in the father's lifetime. It would seem unnecessary to state that the Judges of this Court are agreed upon what is now firmly established law. I make that statement, however, now once and for all in this case, as experience has taught me that, if I did not make it, it might be assumed that I was ignorant of what the law on that point is, and because experience has also taught me that the reiteration of an admitted principle of law distracts attention from the point in issue and may conceal the fact that the admitted principle of law is being wrongly applied or that an unsound deduction is being drawn from it.

I believe we all are agreed that the legal obligation of a Hindu son in a joint family to pay those debts of his father which are not tainted with immorality cannot be enforced except by a suit under chapter IV of Act No. IV of 1882, if the enforcement is sought against joint family property mortgaged by the father to the creditor, or by execution of a simple decree for money obtained in a suit authorized by the Code of Civil Procedure, if the enforcement

be not sought against property mortgaged by the father to the creditor, and that in no case does the law allow the creditor to enforce that legal obligation except by due process of a Court of law.

We all are agreed that s. 85 of Act No. IV of 1882 applied equally to Hindus as to Muhammadans or Christians, and that there is nothing in Act No. IV of 1882 to indicate that the Legislature did not intend that section to apply as fully to Hindus as to Muhammadans and Christians. We all are agreed that s. 85 is highly imperative, and that it is the duty of a Court to dismiss a suit brought and attempted to be maintained by the plaintiff in contravention of that section, whether the suit be brought by a Hindu, Muhammadan or a Christian; but that the Court, if it sees fit so to do, may add necessary parties under section 32 of Act No. XIV of 1882. We all are agreed that the sons in a joint Hindu family are persons having an interest in the property comprised in a mortgage of the family property within the meaning of s. 85 of Act No. IV of 1882, and thus they must be joined as parties to a suit under chapter IV of Act No. IV of 1882 relating to such mortgage, provided that the plaintiff in such suit has notice of such interest, and seeks a decree for sale of the interests of the sons, and not merely a decree for sale of the interests of the mortgagor, their father.

We all are agreed that s. 85 applies as fully to the case of a Hindu son who has an interest in the property comprised in a mortgage as it does to any prior or subsequent mortgagee of the property or to any person mentioned in section 91 of Act No. IV of 1882. We all are agreed that it has been found by the Court of first appeal in this suit that when Bhawani Prasad, the defendant-appellant, brought his suit for sale under chapter IV of 1882 upon his mortgage, he had notice that these plaintiffs-respondents were interested as members of a joint Hindu family in the property comprised in the mortgage. We all are agreed that, if it had been brought to the attention of the Judge in Bhawani Prasad's suit for sale that these plaintiffs-respondents were interested in the property and that Bhawani Prasad was aware of that fact when he instituted

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his suit, it would have been the duty of the Judge to have dismissed that suit, and not to have made a decree for sale of the family property, unless the Judge thought fit to exercise the discretion vested in him by s. 32 of the Code of Civil Procedure.

We all are agreed that, notwithstanding the pious duty of a Hindu son to pay his father's debt not tainted with immorality, the law does not impose upon him any obligation to discharge those debts in any way if a suit to recover them happens to be barred by limitation.

We all are agreed that it is the duty of a Court under s. 4 of Act No. XV of 1877, subject to the other provisions of that Act, to dismiss every suit which is instituted after the period prescribed therefor by the second schedule annexed to that Act, although limitation has not been set up as a defence.

It was conceded at the Bar, and we are agreed, that if a creditor of a Hindu father obtains a decree against the father for sale of the family property, or simply a decree for money, in a suit against the father alone which was barred by limitation and seeks to enforce the decree against the share of a son in the family property, the son is entitled to show that the suit was, when brought, barred by limitation, and that the suit and the decree were in contravention of the Indian Limitation Act, 1877; and that in such a case, even if the son admitted that the debt in respect of which the creditor had brought his suit was one which he, the son, was under a pious obligation to pay, and even if the creditor's decree had become final against the father, that decree could not be enforced against any interest of the son in the family property.

We all are agreed that the sons in a joint Hindu family can defeat the right of a decree-holder to execute against their interests in the family property a decree which he has obtained against their father in a suit against the father alone, notwithstanding that such decree has become final, upon proving that at the time when the suit against their father was brought the debt of their father had been discharged, as, for example, by payment.

We all are agreed that my brother Banerji and I rightly held in our carefully considered judgment in *Lachmi Narain v. Kunji*

Lal, (1) that a creditor, who, in order to obtain payment of a debt due to him by a Hindu father, obtained in a suit against that father alone a decree for money, cannot, after the father's death, bring any part of the family property to sale in execution of that decree unless he had obtained attachment of the property in the father's lifetime; and that in such case the only remedy which is open to the creditor is such suit as he can maintain against the son, and that in such suit by the creditor, and not in the execution proceedings, the question as to whether the father's debt was tainted with immorality could be inquired into. If we are to hold here that Bhawani Prasad's decree for sale can be enforced in this case, there would be startling anomaly in the law or rather in judicial decisions.

In the present case it is not suggested by anyone that Bhawani Prasad's decree was obtained otherwise than in contravention of the imperative provision of s. 85 of Act No. IV of 1882, and yet it is said that he is entitled to execute that decree by sale of the shares of the Hindu sons in the family property, because in fact, although contrary to law, Bhawani Prasad had obtained that decree, and it has become final as against the father, and because there is a pious obligation upon the sons to pay their father's debt unless they can show that the debt was tainted with immorality. On the other hand, in *Lachmi Nar in v. Kaji Lal* (1), a creditor who had in fact obtained in due course of law and procedure a decree against a Hindu father which had become final, but who had not obtained attachment in the father's lifetime was held not to be entitled to execute that decree against any part of the family property, and not even against what had been the father's share, whether or not the debt was one which it was the pious duty of the son to pay. Further, we all are agreed that if Bhawani Prasad's suit for sale had been barred by limitation at the time when it was brought, these plaintiffs-respondents would be entitled to a decree in their suit declaring that Bhawani Prasad's decree could not be enforced against their interests in the family property upon proving that Bhawani Prasad's suit had been in fact barred by limitation, notwithstanding that it was not dismissed and that he got his decree, which had

(1) I. L. R., 16 All. 449.

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become final against the father, and that the sons would be entitled to such declaratory decree without either alleging or proving that the original debt of their father was tainted with immorality. The decision in *Lakshmi Narain v. Kunji Lal* (1) and the admittedly correct proposition of law to which I have last referred show that the sole test as to the right of a judgment-creditor of a father in a joint Hindu family to sell the interests of the sons in the family property in execution of his decree is not the issue whether or not the debt of the father was tainted with immorality; that admittedly true proposition of law and the admittedly true proposition of law that a son in a joint Hindu family can successfully resist the execution against his interests in the family property of a decree obtained against his father, and which has become final, by simply proving that the debt of his father had been discharged, as, for example, by payment, before the suit against the father was brought, show that the finality of the decree so far as the father is concerned is not the test of the liability or non-liability of the sons' interest in the family property to be brought to sale in execution of a decree against the father. It appears to me that these considerations must dissipate two other fogs which during the argument were to some extent obstructing a clear view of the question of law upon which this appeal depends.

I had great difficulty in understanding at the hearing what the contention in favor of Bhawani Prasad really was. At one time it was argued that Bhawani Prasad was entitled to execute the decree for sale by a sale of the sons' interest in the family property because the sons had not in their suit pleaded and proved that their father's debt in respect of which the suit for sale was brought was tainted with immorality. At another time it was argued that Bhawani Prasad was entitled to execute his decree by sale of the son's interest in the family property because, rightly or wrongly, Bhawani Prasad had obtained that decree and it was the pious duty of the sons to discharge the judgment-debt. It appears to me that there has been some confusion of ideas and of legal principles. What the sons say is:—We do not deny that there is a legal obligation upon us to pay

(1) I. L. R., 16 All., 449.

our father's debts which are not tainted with immorality; it will be time enough for us to raise the question as to immorality when a suit is brought against us which is in compliance with s. 85 of Act No. IV of 1882, and by reason of s. 99 of Act No. IV of 1882, it is only in execution of a decree obtained in a suit against us under chapter IV of that Act that our interests in the family property can be sold by this mortgagee; up to the present no such suit has been brought, and this suit of ours is not brought in aid of the decree which Bhawani Prasad obtained, but is brought to obtain a declaration that the decree which Bhawani Prasad got in his suit under chapter IV of Act No. IV of 1882, to which we were not parties, cannot be enforced against our interests in the family property. We entirely dispute the proposition that there is under the Hindu law any pious duty to pay a judgment-debt, as such of our father, obtained in a suit to which we were not parties if that judgment was obtained in contravention of the Indian Limitation Act, 1877, or in contravention of chapter IV of the Transfer of Property Act, 1882, or if the debt, if it ever was incurred, had been discharged by payment before suit; in none of those cases would there be any pious duty or legal obligation upon us to pay the judgment-debt, as such.

The legal obligation arising upon the pious duty of a Hindu son to pay his father's debts which are not tainted with immorality can only be enforced in a properly constituted suit and in due process of law. No one would suggest that a creditor of a Hindu father could, except in the execution of a decree, seize and sell the family property.

Prior to the passing of the Transfer of Property Act, 1882, the procedure allowed by, and the law as administered by, most Courts had caused great hardship to the people and gross scandal to the administration of justice. The only class of people who had benefited in that state of things were the legal practitioners. In those days a mortgagee was allowed by the Courts to bring a suit for sale on his mortgage and to get a decree for sale, and to execute it; without making any person interested in the mortgaged property except the mortgagor a party to his suit, whether the mortgagor

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happened to be a Hindu father who had mortgaged the joint family property of himself and his sons, and whether there were two or a dozen other mortgagees, prior or subsequent, holding separate mortgages over the same property. After the sale the prior or subsequent mortgagees and the Hindu sons brought separate suits against the purchaser, against the mortgagor, and against each other, to the ruin of some, if not all, of them, and the mortgaged property in too many cases finally disappeared in court-fees and the charges of legal practitioners. It was to remedy such a state of things and prevent its recurrence that s. 85 of Act No. IV of 1882 was enacted. The Legislature was not at all concerned, nor am I, with the fact that the enforcement by Courts of Justice of the provisions of chapter IV of Act No. IV of 1882, and particularly of those contained in ss. 99 and 85, would interfere with the means of livelihood of those who adopt the profession of the law in this country. What the Legislature was concerned about, and what it desired to protect, was the interests of those persons in this country who have an interest in property sought to be affected by a suit for sale, or by a suit for foreclosure, or by a suit for redemption, interests which theretofore had been neglected.

The Legislature advisedly used the word "must" in s. 85. That there was necessity for the use of the word "must" by the Legislature to carry its meaning is amply proved by the persistent attempts which have been made to evade compliance with that section and to recur to the former harassing procedure which had been tolerated by the Courts. In enacting s. 85 the Legislature made no exception in respect of joint Hindu families, their contracts, or their property, or the remedy of the creditor of the father in a joint Hindu family. The Legislature in enacting the Transfer of Property Act, 1882, did not overlook the fact that Hindus, Muhammadans and Buddhists had peculiar laws of their own. By s. 2 of the Act it is enacted that "nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law." Section 85 is in chapter IV of the Act. Had the Legislature intended that the provisions of s. 85 should not apply to Hindus, it would have expressly exempted them from its opera-

tion, as it has excluded them by s. 69 from the exercise of a power of sale in a mortgage without the intervention of a Court. I infer that the Legislature intended s. 85 to be applied to all alike, no matter what might be their peculiar rule of their law.

So far as I am aware, no case arising on s. 85 of Act No. IV of 1882 has yet come before their Lordships of the Privy Council, and unless and until I am told by the Privy Council or by the Legislature to apply s. 85 as Bhawani Prasad would have us apply it, I shall not be a party to driving a coach and six through the beneficent provision of that section and to opening the door to a recurrence of the state of things which existed before that section was passed and to bringing ruin and harassing litigation upon the members of Hindu joint families, and for no other purpose than to assist a creditor out of a difficulty which by his wilful disregard of s. 85 he has got himself into.

I am confident that by applying firmly the rulings of this Court in *Mata Din Kasodhan v. Kazim Husain* (1) and *Janki Prasad v. Kishan Dat* (2) and the rule which is, I think, the true rule, and which is enunciated in *Badri Prasad v. Madan Lal* at pages 82 and 83 of I. L. R., 15 All., litigation on mortgages will, so far from increasing, decrease. We shall have before the Courts in suits on mortgages all the parties who are known to the plaintiff to be interested in the property, and their respective rights will be determined in one suit and not in a dozen. It is better to follow the law and insist upon its being obeyed than to act loosely in the administration of the law and perpetuate an evil. If Bhawani Prasad had joined the sons as defendants in his suit for sale there could have been but one suit, and, if he had succeeded, but one set of costs to be paid out of the property under the decree passed under s. 88 of Act No. IV of 1882. If the view of the law contended for on behalf of Bhawani Prasad be correct, Bhawani Prasad, by bringing the suit which he brought in contravention of s. 85, and by concealing from the Court in that suit the fact that his suit was in contravention of the Statute, obtained a decree to which he was not entitled, and yet that decree is to be executed by a sale of the

(1) I. L. R. 13 All., 432.

(2) I. L. R. 16 All., 478.

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interests of the sons in the family property, unless the sons bring a suit against Bhawani Prasad and prove in it that the original debt was tainted with immorality, was barred by limitation, was never incurred, or if incurred, was satisfied by payment or in some other way, before the suit for sale was brought.

I was much struck by one illustration, given by Pandit *Sundar Lal*, when arguing this case, of the legitimate result of our accepting the view of the law contended for on behalf of Bhawani Prasad. It was this:—If it be the law that these Hindu sons cannot resist the execution of this decree for sale except by bringing a suit in which they prove that the debt was tainted with immorality, the same rule must be applied in the case of a suit for foreclosure of a mortgage by way of a conditional sale. In such a suit the decree under s. 86 of Act No IV of 1882 may declare what is the amount due to the plaintiff for principal and interest on the mortgage and for his costs of suit, if any, awarded to him, and may order that upon the defendant paying to the plaintiff or into Court the amount so due on a day within six months from the date of declaring in Court the amount due to be fixed by the Court, the plaintiff shall deliver up to the defendant all documents, &c., and shall transfer the mortgaged property to the defendant, but that if the payment is not made on or before the day to be fixed by the Court the defendant shall be absolutely debarred of all right to redeem. According to the view of the law contended for on behalf of Bhawani Prasad not one of the persons mentioned in s. 91 of Act No. IV of 1882 would be in any way bound by a decree passed under s. 86 unless he was a party to the suit, or unless, although not a party to the suit, he happened to be a son in a Hindu joint family and his father happened to be the defendant to the suit. Any other person mentioned in s. 91 who was not a party to the suit for foreclosure or for sale could, notwithstanding such decree, bring his suit to redeem at any time within sixty years from the time when the right to redeem accrued, and yet the unhappy Hindu son, whether he knew or did not know of the suit or of the decree, would be precluded from all right of redemption unless he paid the amount decreed on or before the day

fixed by the Court, which, in the case of the decree in the suit for foreclosure to which I have referred, would be a day within six months of the date of the decree. The unhappy Hindu son could not dispute the validity of that decree and its binding effect upon his interest in the family property unless he could succeed in a suit brought by him against the mortgagee decree-holder in proving that the mortgage debt had been tainted by immorality. According to the proposition contended for as law on behalf of Bhawani Prasad, it would in such case be sufficient that the mortgagee had got a decree under s. 86 against the father, and it would be absolutely immaterial that the Hindu son had no knowledge of the suit or of the decree until after the period fixed by the decree for redemption had expired and the rights to redeem of the members of the joint Hindu family had been for ever barred. That would indeed be another startling anomaly in the law. I have heard no attempt made to meet that illustration of Pandit *Sundar Lal*, yet, if we hold that Bhawani Prasad's decree can be executed by sale of the interests of these Hindu sons in the joint family property, we must, if we are to be consistent in our construction of s. 85 of Act No. IV of 1882, and in the application of the law, hold, should the case arise, that the rights of the sons in a Hindu joint family to redeem the family property are for ever barred by a decree of foreclosure obtained in their absence, and of which they have had no notice, on the expiration of the time fixed by the Court for redemption, if the original debt was not tainted with immorality. I have not heard any one suggest what is the principle of law, of equity, of justice, or of good conscience by which the period of sixty years allowed to anyone else who is within s. 91 of Act No. IV of 1882 is, in the case of a son in a joint Hindu family, to be cut down by a decree under s. 86 (to which he is not a party and of which he had had no notice) to a period within six months from the date of the decree.

The pious duty of a Hindu son to pay his father's debts which are not tainted with immorality is a fact beyond dispute: the corollary sought to be applied here on behalf of Bhawani Prasad, if it be a legitimate inference from the preceding proposition, reduces, in my opinion, that proposition to an absurdity.

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The decree in Bhawani Prasad's suit for sale decreed the sale of the property unless the amount due for principal and interest on the mortgage and the costs of that suit awarded to Bhawani Prasad were paid within six months. In the course of the arguments, I asked on what possible principle, or on what rule of Hindu or other law, there was any obligation, legal, pious or otherwise, on the sons to pay Bhawani Prasad's costs of the suit for sale which was brought in contravention of s. 85 of Act No. IV of 1882 to which the sons were no parties. To that question no one ventured to offer an answer. In truth, no answer except one could have been given, and that was that neither the sons nor their interests in the family property could on any principle or rule of any law be made liable for these costs; and yet we are asked to hold that their interests may be sold to satisfy the amount decreed, which includes those costs.

Before concluding, I may say that in my opinion that part of my judgment in *Badri Prasad v. Madan Lal* (1) which is contained in the paragraph which commences at page 82 and concludes at page 83, was all strictly relevant to one of the questions which the Full Bench had in that case to decide, namely, what was the decree which we should make in the case? Every word of my judgment in that case was carefully considered in consultation with the other five Judges of the Court as it was then constituted, and as the result of that consultation the judgment as reported was delivered and was concurred in by all the then Judges of the Court. It has not been suggested that the following passage in that judgment was *obiter*:—"In that suit, as they sought a decree for sale against not only Madan Lal's interest in the mortgaged property, but against the interests of his sons, they, having notice that the sons had an interest in the mortgaged property, properly and in accordance with s. 85 of that Act, joined the sons as parties to the suit." That was the opinion which we expressed as to the construction of s. 85 of Act No. IV of 1882. It is said, however, that the following opinion was *obiter*:—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882,

(1) I. L. R., 15 All., 75.

came into force, having notice that the sons had an interest in the property had omitted to join them, they could have obtained a decree against the father's interest only, and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." It appears to me that the latter proposition was necessarily involved in the former. When this case was called on for argument it was pointed out by Pandit *Sundar Lal* that, so far as this Court was concerned, the question of law was concluded by the judgment from which I have quoted. As, however, my brother Banerji was of opinion that the question was still open, and as two other Judges on the Bench thought it arguable whether the passage which I have last quoted was not *obiter*, we decided to hear the arguments in the case. I have already to some extent indicated what in some respects is the difference between a simple decree for money and a decree for sale, and as that subject has been also dealt with in the judgment of my brother Burkitt, which I have had an opportunity of reading, it is not necessary that I should go further into that question. No doubt each is a decree for payment of a debt, but the effect of each decree upon the rights of persons not parties to the suit is totally dissimilar, and the procedure under which each is obtained is different.

I would reply to the question sent to the Full Bench by saying that, under the circumstances stated in that question, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by Pemi, although the sole ground of their suit is that they were not parties to the suit by Bhawani Prasad.

BURKITT, J.—The question referred to the Full Bench is as follows :—

"When a plaintiff-mortgagee institutes a suit for sale under section 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interest in the mortgaged property he has

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notice, and obtains a decree and an order absolute for sale against the father only, can the sons successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell their interests in the mortgaged property in execution of that decree, the sole ground of their suit being that they were not parties to the suit of the mortgagee?"

The facts on which it has arisen are very simple. One Pemi and his sons constituted a joint undivided Hindu family possessed as such of certain ancestral property. Pemi mortgaged a share in a grove, being a portion of the ancestral joint property, to the defendant-appellant Bhawani Prasad. The latter instituted a suit under the Transfer of Property Act against Pemi to recover the debt by sale of the mortgaged property and obtained a decree for sale. In that suit Pemi's sons were not impleaded. When Bhawani Prasad applied under s. 89 of the Transfer of Property Act for an order absolute for sale some of Pemi's sons intervened and objected to the order being made. Their objections were overruled. Accordingly in the present suit Kallu, Zorawar and Khiali, three out of the five sons of Pemi, ask for a declaration that their interest in the joint property, of which they declare themselves to be in possession, is not liable to be taken and sold in execution of *the decree* against their father. In their plaint many matters were alleged, but they have all fallen to the ground, excepting the plea that as the plaintiffs, though being "persons having an interest in the property comprised in the mortgage," of which interest Bhawani Prasad had notice, were not joined as parties to the suit, they are not bound by the *decree* against their father, and that their interest in the joint property could not be sold to satisfy that decree. The first Court dismissed the suit on the ground that the plaintiffs, the sons, had not attempted to prove that their father's debt was contracted for immoral purposes. The lower appellate Court held that the plea as to non-joinder of the sons was fatal and gave a decree in favor of the sons. Hence this appeal by the mortgagee decree-holder.

The question for our consideration and decision is—can the interests of the sons, the respondents, be sold under the circum-

stances mentioned above in execution of the decree against the father? Now, s. 85 of the Transfer of Property Act lays down in very comprehensive and imperative language that "all persons having an interest in the property comprised in a mortgage *must be joined* as parties to any suit under this chapter (i.e., chapter IV) relating to such mortgage." The suit by the appellant on his mortgage against his mortgagor, Pemi, was a suit under Chapter IV of the Transfer of Property Act. It is clear also that, as Pemi had sons, and as the mortgaged property being ancestral was the joint undivided property of Pemi and of his sons, the latter were persons who had an interest in the property comprised in the mortgage. They therefore, under the provisions of s. 85, should have been made parties to the suit. They were not so impleaded. No question has been raised as to appellant having notice of the son's interest. He has not denied that he had such notice, and the suit and this reference proceeded on the assumption that he had notice. What then is the result of the appellant's failure to implead Pemi's sons? That question is answered in very distinct and unmistakeable language by the Full Bench of this Court in the case of *Badri Prasad v. Madan Lal* (1). That was a case in which a person who held a mortgage executed by the father in a Hindu joint family sued not only the father but also the sons on the mortgage. It was held that the sons were properly impleaded in their father's lifetime under s. 85 of the Transfer of Property Act, and the Full Bench added:—"If the plaintiffs in this suit, which was commenced after the Transfer of Property Act, 1882, came into force, having notice that the sons had an interest in the property, had omitted to join them, they could have obtained a decree against the father's interest only, and could not have obtained a decree for sale which would have affected the interests of the sons in the mortgaged property." I was one of the Judges who concurred in that dictum, and I see no reason whatever for dissenting from it now. It is contended however that the dictum is merely "*obiter*," and that possibly is so, as it was not strictly necessary for the decision of the case. But even so, it is a dictum of the learned Chief

(1) I. L. R., 15 All., 75.

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Justice, in which the five other Judges of the Court after consultation unanimously concurred.

The effect of the non-joinder of Pemi's sons in the suit on the mortgage of the joint property, in my opinion, is that those sons are not bound by *the decree* in that suit nor are their interests affected by it. It was faintly contended for the appellants that the sons were not persons "having an interest" in the mortgaged property. In my opinion there is no force in that contention. Each of the sons at his birth acquired an interest in the ancestral joint property of the family into which he was born, and I have no doubt that such an interest is "an interest in the property" within the meaning of s. 85 of the Transfer of Property Act, 1882. It was further contended that the omission to implead the sons did not vitiate the decree obtained against Pemi. That proposition is, I think, correct as far as Pemi is concerned; the decree having now become final is a perfectly good decree, though, had a plea of non-joinder of necessary parties been taken before decree, either the suit would necessarily have been dismissed or the sons would have been added as parties under section 32 of the Code of Civil Procedure. But I cannot accede to the further proposition that the decree is a good decree against, and is one which affects the interests of, the sons, unless they can show either that there was no debt of the father or that the debt was contracted for immoral purposes. To affirm such a proposition would, in my opinion, have the effect of repealing *pro tanto* s. 85 of Act No. IV of 1882, inasmuch as it would relieve a plaintiff instituting a suit under chapter IV of Act No. IV of 1882 from the necessity of complying with the imperative requirements of that section in the matter of the joinder of the parties jointly interested in the mortgaged property as members of an undivided Hindu family of whose interest the plaintiff has notice.

It was argued that under the "pious duty" incumbent on sons in a Hindu family of paying their father's debts when not tainted with immorality the respondents in this case could not resist the appellant's claim to take their interests in the joint property to satisfy their father's debt. Such no doubt might have been the

case if the decree against the father had been a simple money decree. In that case, the ancestral property of the family might have been sold in execution of that decree. But if the mortgagee in the present case had been content to ask for and obtain such a decree he would have subjected himself to the risks attaching to the holder of a simple money decree, such for instance, as that he would not be entitled under clause (c) of section 295 of the Code of Civil Procedure to have the proceeds of the sale applied (after payment of expenses) to the discharge of the principal and interest due on his incumbrance *in priority* to other holders of decrees for money. That is one of the risks he would incur, and I may also mention another and a very serious risk which he would be subject to as holder of an ordinary money decree against the father only in a joint Hindu family, there being in existence sons who were not parties to the decree. Unless the holder of such a decree takes steps during the father's lifetime to enforce his decree by attachment of the joint ancestral property, he cannot after the father's death have execution of his decree against the joint ancestral property, and must institute a suit against the sons if he desire to enforce against them the "pious duty" of paying the debt of their deceased father. This rule is very fully and clearly laid down in the recent case of *Lachmi Narain v. Kunji Lal* (1) in which, after an elaborate examination of the authorities bearing on the question it was held that a "creditor of a father in a joint Hindu family governed by the law of the Mitakshara, who has obtained a simple decree for money in a suit against the father alone, cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in execution of that decree instituted after the death of the father and not being a proceeding in continuation of an attachment of the property affected during the lifetime of the father." In such a case it was further held that "if the creditor desire to obtain a remedy against the ancestral property or any part of it in the hands of the son he must seek that remedy in a suit against the son," in answer to which the son will be entitled to prove any

(1) I. L. R., 16 All., 440.

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matter which would be a defence to the suit. It is impossible to entertain any doubt as to the correctness of the rule of law propounded in that case. To my mind it goes very far towards minimising the "anomaly" on which so much stress was laid at the hearing of this appeal. That anomaly consisted in this, that the holder of a simple money decree against the father alone in a joint Hindu family might have execution of that decree against the joint ancestral property of the whole family (the debt not being one tainted with immorality), while the holder of a decree for sale under the Transfer of Property Act against the father alone could sell in execution of that decree the interest of the father alone, if the view of the law for which the respondents contend is correct. But the force, if any, of that anomaly is much lessened by the consideration I have adverted to above, and further I would add that if the appellant had obeyed the law laid down in s. 85 of the Transfer of Property Act, and on impleading the respondents had obtained a decree for sale against them also, he would have been entitled to have execution of that decree against the whole joint ancestral property, whether or not other persons held simple money decrees against the father or against any of the sons or against all of them, and also whether or not the father had died before process of execution had commenced. Clearly, if a plaintiff, when instituting a suit under chapter IV of the Transfer of Property Act, complies with the provisions of s. 85 of that Act, he, on obtaining a decree for sale, occupies an immeasurably stronger position than the holder of a simple decree for money, despite of the length to which the rights of the latter have been recently extended by the Privy Council.

In my opinion, in a suit under Act No. IV of 1882, the "pious liability" of a son to pay his father's mortgage debt can be enforced only in a suit for sale properly framed for that purpose, and with a proper array of parties, as was the case in *Badri Prasad v. Madan Lal*, where the sons were impleaded. It must be enforced by a suit for sale which complies with the provisions of s. 85 of the Transfer of Property Act, and not by a suit in which those provisions are entirely disregarded.

I hold that the present is not the stage at which any question of a son's "pious duty" can be raised. The respondents here are not directly questioning the fact that such a "pious duty" is incumbent on them. They ask for no more than a declaration that the decree for sale obtained in a suit for sale under Act No. IV of 1882, to which they were not parties, does not affect their interests in the joint property mortgaged by their father. They do not, by this suit say that they are not liable to pay the debt if there be a subsisting debt enforceable against them by virtue of a "pious duty," but they do say that the procedure by which it is sought to enforce that liability on them, that is to say in execution of a decree for sale to which they ought to have been, but were not, made parties, is not one permitted by the Transfer of Property Act. In my opinion that contention ought to be allowed, as I hold that here the liability arising out of the "pious duty" incumbent on the respondents cannot be fixed on them in execution of a decree for sale under the Transfer of Property Act obtained against their father alone. Recently in the case of a prior mortgagee who had instituted a suit for sale without joining a puisne incumbrancer of whose interest he had notice,—*Janki Prasad v. Kishen Dat* (1) a similar rule was laid down. And in the case of *Matadin Kasodhan v. Kazim Husain* (2) the object of s. 85 of the Transfer of Property Act is stated to be to "enable parties to protect their own interests and to prevent litigation."

The present case is a very apt illustration of the mischief which s. 85 was intended to prevent; for, had the mortgagee-appellant, Bhawani Prasad, obeyed the directions of that section by impleading Pemi's sons, this suit would have been unnecessary and impossible. The present litigation is due solely to the appellant's having disobeyed the plain provisions of the law and not to any fault of the respondents.

I cannot possibly assume that, when framing Act No. IV of 1882 the members of the Legislature lost sight of so well-known and so widespread a tenure as that of land held in co-parcenary by a joint undivided Hindu family. When therefore s. 85 of that Act imposes on a plaintiff instituting a suit under chapter IV

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Barkitt, J.

(1) I. L. R., 16 All., 479.

(2) I. L. R., 13 All., 342.

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of the Act the obligation of joining all parties who possess an interest in the mortgaged property, and of whose interest he has notice, I am unable, without making the impossible assumption mentioned above, to see my way to inferring that the Legislature intended to exempt from that obligation a plaintiff who institutes a suit for sale of the joint property of an undivided Hindu family. The wording of s. 85 is most imperative. It contains no hint that it is not to be applied to all suits under chapter IX of the Transfer of Property Act, and, that being so, I am of opinion that the obligation imposed by it should, like other positive obligations created by law, be enforced by a Court of Justice.

For the above reasons I would reply in the affirmative to the question referred to the Full Bench.

KNOX, J.—I concur with what the learned Chief Justice has just said. Personally, I never had any doubt but that the question set out in the reference could only be decided in favor of the respondents. There seemed no room for a dispute upon the point. The imperative provisions of s. 85 of Act No. IV of 1882, the interpretation placed upon that section by the Court in *Matadin Kasodhan v. Kazim Husain* (1) and the subsequent decision in *Badri Prasad v. Madan Lal* (2) in my mind pointed irresistibly to the conclusion that the decree which Bhawani Prasad obtained was one which conveyed the father's interests only. Still, as it was earnestly pressed upon us by a leading vakil of this Court that the question was not concluded, and it was a question which in the interests of the public should be placed beyond all possible doubt, I consented to make the reference. Moreover, in order to avoid a misconception which may arise from what has been said in another judgment of the Court in this case, I think it well to point out that the decrees for sale to which their Lordships of the Privy Council referred were decrees passed before the Transfer of Property Act, 1882, came into force.

My answer to the reference is in the affirmative.

BLAIR, J.—I also would unhesitatingly answer this question in the affirmative, for the adequate and, as it seems to me, conclu-

(1) I. L. R., 13 All., 342.

(2) I. L. R., 15 All., 75.

sive reasons urged by the Chief Justice and my brother Burkitt. I have no doubt whatever that the language of s. 85 of the Transfer of Property Act is absolutely imperative. I see, neither in that section nor in the chapter which contains it, any hint of limitation or exception; and it is to me quite inconceivable that in a territory peopled by Hindus, an immense number of whom hold their property under the Hindu family system, they could have been intended by the Legislature to be exempted from the action of s. 85, unless there had been, which there are not, words to indicate such exemption. I agree with my brother Burkitt that this is one of the cases which indicates the object of the section and the necessity for its enforcement. I also would answer the question referred in the affirmative.

AIKMAN, J.—I concur in the judgments of the learned Chief Justice and my brother Burkitt, and would answer the question referred in the affirmative.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Burkitt and Mr. Justice Aikman.*

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May 30.

HUSAINI BEGAM (PETITIONER) v. HUSAINI BEGAM AND OTHERS
(OPPOSITE PARTIES.)

Act No. X of 1870 (Land Acquisition Act), s. 39—Apportionment of compensation referred to Judge—Denial by one party of right of another to share in compensation—Appeal.

Under s. 85 of Act No. X of 1870 the fact that one of the persons concerned denies altogether the right of another of such persons to share in the compensation awarded will not prevent an appeal lying from the order of a District Judge apportioning compensation. *Kishan Lal v. Shoukar Singh* (1) overruled.

THIS was a reference to the Full Bench in an appeal from an order of the District Judge of Bareilly under s. 39 of the Land Acquisition Act, 1870.

The order of reference was as follows:—

EDGE, C. J., and BANERJI, J.—This is an appeal from a decision of the District Judge of Bareilly deciding the proportions in which certain persons claiming an interest in compensation made on

First Appeal No. 293 of 1893, from an order of T. B. Redfern, Esq., District Judge of Bareilly, dated the 30th June 1893.

(1) Weekly Notes 1888, p. 170.

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account of the acquisition of a house and land under Act No. X of 1870 were entitled to share in the amount of compensation which had been settled by the District Judge. The rival claimants deny each other's title to the share in the amount of compensation. The preliminary question is, does an appeal lie, under s. 39 of Act No. X of 1870, from the decision of the District Judge of this Court? We refer this question to a Full Bench of this Court. Our reason for making this reference is that Straight and Mahmood, JJ., in *Kishan Lal v. Shankar Singh* (1) held that where the titles of rival claimants were mutually denied no appeal lay under s. 39. The soundness of that ruling appears questionable, having regard to the wording of ss. 14, 37, 39, and particularly of the definition of "person interested" in s. 3 of that Act. It would appear that those learned Judges omitted to notice that definition.

The facts of the case are sufficiently stated in the order of the Full Bench.

Moti Lal for the appellant.

Sundar Lal and *Gobind Prasad* for the respondents.

The judgment of the Full Bench (EDGE, C. J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ) was delivered by Edge, C. J.—

In this case land was taken under the compulsory provisions of Act No. X of 1870. The parties could not agree as to the amount of compensation, nor could they agree as to the apportionment of the compensation, and accordingly the Collector of Pilibhit referred the matter, under s. 15 of the Act, to the Court of the District Judge of Bareilly for determination. The District Judge settled the amount of the compensation, and he also decided the proportions in which the parties interested, within the meaning of s. 39 of the Act, were entitled to share in such amount. One of the claimants, namely, Musammat Husaini Begam, claimed to be entitled to the whole of the compensation awarded. The District Judge awarded her only a portion of the compensation. From that decision of the District Judge, Musammat Husaini Begam appealed to this Court. When the appeal was called on for hearing before a Division Bench, the learned vakil for the respondents, relying upon the decision of

(1) Weekly Notes 1888, p. 170.

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this Court in *Kishan Lal v. Shankar Singh* (1) raised an objection to the hearing of this appeal on the ground that the appeal did not lie as Husaini Begam's right to share in the compensation was not only not admitted, but was disputed. The Division Bench doubting the correctness of the decision in *Kishan Lal v. Shankar Singh* referred to the Full Bench the question whether the appeal lay. The learned Judges who decided in *Kishan Lal v. Shankar Singh* that the appeal in that case did not lie were under the impression that no appeal lay under s. 39 of Act No. X of 1870, as to the apportionment, if the title of the appellant to share in the amount awarded was disputed and not admitted. Those learned Judges overlooked the definition of s. 3 of Act No. X of 1870. By that section a "person interested" is thus defined:—"The expression 'person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act." What the Judge has to do under s. 39, so far as the apportionment is concerned, is to "decide the proportions in which the persons interested are entitled to share in such amount." Such amount is the amount of compensation which has been settled. There is nothing in the section to suggest that the Judge should not decide, as between rival claimants to compensation, whether those claimants respectively claim the whole amount or a proportionate part only, all questions of title upon which their right to share in the amount and the proportion to be awarded to them respectively, could depend. The definition clause shows that the words "person interested" are not confined to persons whose title to share in the amount awarded has been admitted. In our opinion the judgment of the Court in *Kishan Lal v. Shankar Singh* was wrong. The High Court at Bombay has held in *Kashim valad Kamal Naik v. Iminbi kom Gavasumiya and the Collector of Belgaum* (2) that an appeal lay in a case under such circumstances, the case before that Court being one in which each of the claimants laid claim to the entire amount of the compensation, consequently denying the title of the other to any share in the compensation. It is also clear from the judgment of their Lordships of the Privy Council in *Rajah*

(1) Weekly Notes 1888 p. 170. (2) 1. L. R., 16 Bom., 525.

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Nilmon Singh v. Ram Bundhoo Roy (1) that, subject to the appeal given by s. 39 of Act No. X of 1870, the decision of the Judge under that section is final and cannot be questioned by a suit, and that the proviso to s. 40 only applies to the cases of persons whose rights have not been determined under the earlier clauses of the Act, such as minors or persons under disability who did not appear at the inquiry as to the amount to be awarded as compensation. This is a further reason, if further reason were required, why we should interpret s. 39 as giving a right of appeal in such a case as this, and our opinion is that the appeal in this case lay. With this answer to the question submitted to the Full Bench the appeal will go back for disposal to the Bench which referred the case.

APPELLATE CRIMINAL.

1895
May 31.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS versus GOBINDA AND ANOTHER.

Act No. XXV of 1860 (*Indian Penal Code*), s. 411—*Evidence*—*Pointing out stolen property concealed in a place not under the accused's control.*

Where the sole evidence against a person charged with an offence under s. 411 of the *Indian Penal Code* consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person; held that this was not in itself sufficient evidence to support a conviction under the abovementioned section.

THIS case was referred to a Division Bench by Aikman, J., for the reasons expressed in the following order:—

"I refer this appeal for hearing to a Division Bench. The conviction of the appellant is based merely on evidence that he pointed out a spot in a field, not his own, where certain stolen property was found, and dug up the property therefrom. The conviction could not, according to the ruling of Tyrrell, J., in the case of *Empress v. Kinkhar* (*Weekly Notes*, 1881, p. 94), and the ruling of Duthoit, J., in an unreported case, *Empress v. Bindu* (Criminal Appeal No. 742, decided on the 12th of January, 1885), be supported on the evidence. But it appears to me that the rule laid down in the cases just referred to is somewhat too broadly stated. I

(1) L. R., 3 I. A., 90.

think it right that the point, which is an important one, should be considered by two Judges and order accordingly."

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

EDGE, C. J., and BANERJI, J.—Some articles were stolen on the 23rd of December, 1894. Some of these were found in the house of Dhankua and some in his field. He gave no reasonable explanation how he came to be in possession of the articles found in his house. He was rightly convicted under s. 411 of the Indian Penal Code, and we dismiss his appeal.

Gobinda has been convicted of an offence made punishable under s. 411 of the Indian Penal Code. He pointed out a place in the field of another man in which some of the stolen articles were found. There is no other evidence against him. The mere fact that a person points out a place where stolen property is concealed, if that place is not in his own house or in his own field, but is in the field of another man, is not sufficient, in our opinion, to entitle the Court to find that the person who pointed out the stolen article had received it, or retained it, knowing it to be stolen. There must, to support a conviction in such a case, be some evidence which suggests that the accused himself concealed the article in the place where it was found. It is not sufficient for a conviction that the accused pointed out the stolen article, if it is left doubtful whether the accused or some other person concealed the stolen article, or that the accused obtained in some other way information that the stolen property was in the place where it was found. In Gobinda's case we allow his appeal, and, setting aside his conviction and sentence, we acquit him of the charge of which he has been convicted and direct that he be at once released.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

PATESHURI PARTAP NARAIN SINGH AND ANOTHER (DEFENDANTS) V.
BHAGWATI PRASAD (PLAINTIFF).

Act No. VII of 1889 (Succession Certificate Act) s. 4—Joint Hindu family—Suit by survivor for debt due to joint family—Evidence—Presumption as to nature of debt where the family is joint.

Where a debt is advanced from the funds of a joint Hindu family and is due to that family, no certificate under Act No. VII of 1889 is necessary to enable the survivor of such family to recover the said debt.

Such debt as above being a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family.

Jagmohandas Kilabhai v. Allu Maria Duskal (1) followed.

THIS was a suit for sale on a mortgage executed by the father of the defendants, the Raja of Basti and his brother, in favor of the plaintiff's father. With the Raja and his brother were joined as defendants several other persons who were purchasers or mortgagees of some of the villages mortgaged by the deed upon which the suit was brought. In the third paragraph of the plaint the plaintiff stated:—"That Babu Sarju Prasad, the father of the plaintiff, and the plaintiff, were the members of a joint Hindu family; and so long as the family was joint, he had no source of income. Babu Sarju Prasad, Mahajan, died on the 29th February, 1888, while the family was joint; and the plaintiff by right of survivorship obtained possession as owner of all the property of the joint family, including the bond sued on. He is therefore competent to maintain this suit."

The defendants, the Raja of Basti and his brother, pleaded *inter alia* that they and their father, the original mortgagor, had constituted a joint Hindu family; that the debt for which the mortgage had been given had been incurred for immoral purposes, and that therefore it was not chargeable on the ancestral property of the family. They also pleaded, in the fourth paragraph of their written statement, that "the plaintiff has not obtained a certificate of heirship, and his claim without doing so is inadmissible."

First Appeal No. 51 of 1893, from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 29th November 1892.

(1) I. L. R., 19 Bom., 338.

The Court of first instance (Subordinate Judge of Gorakhpur) found that the debt was not tainted with immorality, and, disallowing the pleas of the various subsequent mortgagees and purchasers, passed a decree in favor of the plaintiff. The Subordinate Judge framed an issue on the question whether a certificate of succession was necessary, but came to no finding upon it.

The two principal defendants appealed to the High Court, and, the case coming on for hearing before Edge, C. J., and Banerji, J., the following order of reference was made:—"The defendants, who are appellants here, as their 4th plea in their written statement pleaded 'that the plaintiff has not obtained the certificate of heirship, and his claim without doing so is inadmissible.' The Subordinate Judge framed an issue, *viz.*, the 13th, on that plea. He did not try it. If the certificate was necessary, the plaintiff was not entitled to have a decree passed until he produced the certificate. Mr. Reid says that no certificate was necessary because it is alleged in paragraph 3 of the plaint that the father of the plaintiff and the plaintiff were members of a joint Hindu family, and that the plaintiff by right of survivorship obtained possession as owner of all the properties of the joint family including the bond sued on. If it be the law that the survivor of a joint Hindu family can, without producing a certificate under the Act, obtain a decree for a debt which on the face of it became due to a deceased member of the family, then paragraph 3 of the plaint was in effect put in issue by paragraph 4 of the written statement, and the issue ought to have been tried. We have been referred by Mr. Viddya Charan Singh to the case of *Venkataramanna v. Venkayya*(1) and to the case of *Vaidyanatha Ayyar v. Chinnaasami Naik*(2). We express no opinion on either of those cases. We make an order under s. 566 of the Code of Civil Procedure, and direct the Subordinate Judge to try the 13th issue framed by the Subordinate Judge, Babu Brij Pal Das, and to return the finding to this Court. It appears that there is no evidence to the record on this issue one way or the other. The Subordinate Judge will permit the parties to produce evidence on this issue. Ten days will be allowed for filing objections on the return."

(1) I. L. R., 14 Mad., 377. (2) I. L. R., 17 Mad., 108.

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On this order the Subordinate Judge found "that the debt was due to the plaintiff and his father as members of a joint Hindu family."

The appeal being again put up with certain objections filed by the respondent.

Mr. *T. Conlan* and Munshi *Gobind Prasad*, for the appellants.

The Hon'ble *W. M. Colvin*, Mr. *A. H. S. Reid*, Munshi *Jwala Prasad*, Munshi *Ram Prasad* and Munshi *Madho Prasad* for the respondent.

The following judgment was delivered :—

EDGE, C. J., and BANERJI, J.—In first appeal No. 14 of 1893, in which the judgment was delivered on the 18th of December, 1894, we fully considered the question of the alleged immorality and the question of the alleged gift. It is not suggested that there is any feature in this case which would make us alter the view of the facts which we then took.

On the question of there being any necessity for a certificate under the Act No. VII of 1889, the findings on remand show that the debt was advanced from the funds of a joint Hindu family and is due to that family. There was consequently no necessity for a certificate in the suit by the survivors.

In our opinion it is not necessary in such a case that it should appear in the bond that the funds were those of a joint Hindu family, and we agree with the case of *Jagmohandas Kilabhai v. Allu Maria Duskal*(1).

The other grounds were not pressed. We dismiss this appeal with costs. We have given effect to the objections filed to the findings on remand.

Appeal dismissed.

FULL BENCH.

1896
June 7.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji, Mr. Justice Burdett and Mr. Justice Aikman.

NARINDRA BAHADUR PAL (DEFENDANT) v. KHADIM HUSAIN AND
OTHERS (PLAINTIFFS)

No. XXXII of 1889—Act No. IV of 1882 (*Transfer of Property Act*) ss. 88, 89
—Mortgage—Non-contractual *post diem* interest—Such interest not part of the
mortgage money—Act No. XV of 1877 (*Indian Limitation Act*) Sch. ii Art.
116—Limitation.

When in a suit for sale under ss. 88 and 89 of Act No. IV of 1882 a Court
lows, under Act No. XXXII of 1889 interest *post diem*, its decree so far as such
post diem interest is concerned is not a decree for sale under section 88, but is a
decree for money which can be executed in the manner provided for the execution
simple money decrees. *Bikramjit Tewari v. Durga Dyal Tewari* (1) dissented
from.

Article 116 of sch. ii of Act No. XV of 1877 applies to a claim to have interest
allowed under Act No. XXXII of 1889 in respect of the non-payment on the due
date of the money due under a registered mortgage-deed, if the suit is not brought
within six years of the breach of contract.

The facts of this case are fully stated in the judgment of the
Court.

Babu Jogindro Nath Chaudhri for the appellant.

Mr. D. N. Banerji for the respondents.

EDGE, C.J., KNOX, BLAIR, BANERJI, BURDITT and AIKMAN, JJ.
On the 28th of April, 1892, the plaintiffs, who are the respon-
dents in this appeal, brought a suit in the Court of the Subordi-
nate Judge of Gorakhpur praying for a decree for sale under s. 88
Act No. IV of 1882 of the villages Birari and Bhadwa on a
mortgage dated the 28th of April, 1879, and also praying that in
event of the sale proceeds of the two villages not being suffi-
cient for the satisfaction of the demand of the plaintiffs, an order
should be entered in the decree for recovery of the balance of the
amount which might be decreed from the other movable and
immovable property of the defendants. The amount claimed was
Rs. 17,906, of which Rs. 7,000 was claimed as principal and
10,906 as interest.

The only pleas raised in the written statement which are relied
on in the grounds of this appeal were that there was no condition

I. L. R., 21 Cal., 274.

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HUSAIN.*Full Bench.*

in the mortgage-deed for the payment of interest after the due date, and that by reason of limitation the plaintiffs were not entitled to interest as damages.

The mortgage-deed was one not presenting any difficulties of construction. The principal money was Rs. 7,000, upon which interest at the rate of one rupee per centum per mensem was agreed to be paid. The condition as to the repayment of the principal and the payment of the interest was, as correctly translated, as follows :—

“I therefore covenant and execute this bond that the aforesaid sum (Rs. 7,000) with interest at the rate of one per centum per mensem from to-day's date until the date of realization within one year I shall pay and satisfy.” The other subsequent material clauses in the mortgage-deed were as follows :—

“In lieu of the said sum of money I mortgage and hypothecate the entire mauzas Birari and Bhadwa, tuppa Jhar Kola, pargana Mahawli, belonging exclusively to myself, and which are in no way alienated, and in my, this executant's, possession and occupation; and until I pay in full the whole of the amount of principal and interest at the aforesaid rate I shall not transfer the aforesaid shares to anyone by sale or mortgage. When I pay off the principal with interest I shall obtain a registered receipt from the said Shaikhs. If I, from any reason whatsoever, pay the money into the Treasury of the Court, I shall not claim any costs incurred by me. * * * * If I fail to pay the money with interest on the due date, the said Shaikhs shall have power to recover the said sum of money together with interest at the rate of one per centum per mensem and costs from the mortgaged property and other properties movable and immovable belonging to me. * * * The money which I shall pay shall first be credited towards interest and the balance towards the principal. If during the currency of the stipulated term the said mahajans should have any cause of uneasiness on account of any act on my part, the said mahajans shall have power to realise the principal and interest due to them from the person or property of this executant, the details of which are given above, and shall not wait for the expiry of the stipulated period.”

The Subordinate Judge, who, through negligence or otherwise, apparently mistranslated the mortgage-deed, stated that on a perusal of the deed he was of opinion that the parties intended that interest should continue to run until payment, and that it was not intended that the payment of interest should be restricted to one year, and he gave the plaintiffs a decree for Rs. 17,906 with costs and future interest at the rate of 8 annas per centum per mensem, and ordered that if the amount decreed should not be paid within four months the property should be sold. The principal defendant appealed from that decree. In consequence of a recent ruling of the High Court at Calcutta in *Bikramjit Tewari v. Durga Dyal Tewari* (1) the appeal was referred to a Full Bench.

For the defendant-appellant it was contended that by the deed interest ran from the date of the deed (the 28th of April, 1879) until payment within one year from that date, and if payment were not made within the year then that interest ran for one year from the date of deed and no longer, and that the other conditions of the deed binding the mortgagor not to transfer the mortgaged property and giving the mortgagees power in case payment was not made to recover the principal with interest were common form conditions which are inserted in nearly all mortgage-deeds in these provinces, whether the mortgage-deeds confine the mortgagee's liability for the payment of interest to interest during the term of the mortgage, or provide for the payment of interest not only during the fixed term of the mortgage but after the due date of the mortgage. It was also contended on behalf of the appellant that interest which might be allowed by a Judge under Act No. XXXII, 1839, upon a mortgage was of the nature of damages and was not of the nature of contractual interest, and in any event that it was not "interest on the mortgage" within the meaning of s. 86 of Act No. IV of 1882, and that in this case the claim in respect of interest, either as called interest or as damages, after the expiration of the year from the date of the mortgage was barred by the Indian Limitation Act, 1877. For the appellant the following authorities were relied upon: *Cooke v. Fowler* (2), *Bishen Dayal*

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(1) I. L. R., 21 Calc., 274.

(2) L. R., 7 H. L. 27.

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v. *Udit Narain* (1), *Mansab Ali v. Gulab Chand* (2), *Bhagwant Singh v. Daryao Singh* (3), *Sri Niwas Ram Pandey v. Udit Narain Misr* (4) and *Gudri Koer v. Bhuboneswari Coomar Singh* (5).

For the plaintiffs-respondents it was contended that, according to the mortgage-deed, interest as such was payable, not only for the term of the mortgage but after the due date, and in any event that the Court could allow interest after the due date under Act No. XXXII of 1839, and that interest so allowed was not to be considered as damages but as interest which the parties had within their contemplation when the mortgage-deed was made, as they must be presumed to have known the provisions of Act No. XXXII of 1839, and that that Act might be applied if the principal and interest due under the mortgage were not paid on the due date. It was also contended on behalf of the respondents that interest allowed by a Court under Act No. XXXII of 1839 on the non-payment of the principal and interest on the due date of a mortgage was "interest on the mortgage" within the meaning of s. 86 of Act No. IV of 1882. For that proposition the judgment in *Bikramjit Tewari v. Durga Dyal Tewari* (6) was relied upon. It was also contended that a Court could decree interest under Act No. XXXII of 1839 notwithstanding that the period of limitation prescribed by art. 116 of the second schedule of the Indian Limitation Act, 1877, had expired before the suit had been brought. It was contended that this was the legitimate conclusion to be deduced from the case reported. The other cases relied upon on behalf of the respondent were the following:—The *anonymous case in 4 Taunton* 876, *Price v. The Great Western Railway Co.* (7) and *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* (8).

In our opinion the construction of the mortgage-deed admits of no doubt. The term was one year from the 28th of April, 1879. The mortgagees could on the expiration of that year sue for and

(1) I. L. R., 8 All. 486.

(2) I. L. R., 10 All. 85.

(3) I. L. R., 11 All. 416.

(4) I. L. R., 19 All. 330.

(5) I. L. R., 19 Calc. 19.

(6) I. L. R., 21 Calc. 274.

(7) 16 M. and W. 244.

(8) I. L. R., 1 Ch. Div. 120.

recover the principal moneys remaining due at the expiration of that year; in certain events the mortgagees could before the expiration of that year sue for and recover the principal and interest due at the date of their suit. On the other hand, the mortgagor could, by payment to the mortgagees or into the Treasury of the Court of the principal and interest due, redeem the mortgage even before the expiration of the year. The payment of *post diem* interest was not provided for by the mortgage-deed, and certainly, according to the ordinary construction of such deeds in these provinces, which we believe to be correct, was not contemplated by the mortgagor. The conditions in the mortgage-deed binding the mortgagor not to transfer the mortgaged property, and giving the mortgagee power to recover the principal money with interest if the mortgagor failed to pay the principal with interest on the due date, are ordinary conditions commonly inserted in mortgage-deeds in these provinces, whether it is intended that interest shall run only to the due date or shall run not only to the due date but after due date and until the principal sum shall have been paid. Such conditions are never construed in this Court as indicating that interest shall continue to run after the due date.

It may be said that if the mortgagees had not construed the mortgage-deed as providing that interest should continue to run after the expiration of the year which began on the 28th of April, 1879, why did they not bring their suit within the period prescribed by art. 116 of the second schedule of the Indian Limitation Act, 1877? It is possible that the mortgagees may have misconstrued the mortgage-deed, and it is also possible that they may have taken the same view of the law as was taken in *Bikramjit Tewari v. Durga Dyal Tewari* (1) and have been unaware of the application of art. 116 of the second schedule of the Indian Limitation Act, 1877. It is useless to speculate as to the reasons which may have influenced the mortgagees. What we have to decide is, what was the mutual intention of the parties as evidenced by the mortgage-deed. We have said that in our opinion the construction of the mortgage-deed is not open to doubt. If the construction of the mortgage-deed were open

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to doubt, we, sitting here to administer the law, would be bound in justice, equity and good conscience to construe the mortgage-deed in favor of the mortgagor and against the mortgagees on any doubtful point. It requires but little knowledge of borrowers and of money-lenders in these provinces to be aware that it rarely happens that a small zamindar or an agriculturist has legal assistance of any kind in the negotiation for a loan on mortgage or in the preparation or approval of a mortgage-deed. The borrower goes to the money-lender, and it is the money-lender who prepares the mortgage-deed and who is responsible in ninety-nine cases out of one hundred for the language used in it. The money-lender is a shrewd man of business; the needy zamindar or needy agriculturist may understand the cultivation of land and the value of crops and seeds, but, until taught by bitter experience, he has but the most hazy conception of legal phraseology. It would be as reasonable to construe a doubtful contract between a spider and a fly against the fly as it would in these provinces be to construe a doubtful provision in a mortgage-deed against the mortgagor.

When by a mortgage-deed it is provided that the principal and interest at an agreed rate shall be payable at a certain time, and the mortgagor fails to make payment on or before that date, it is, subject to the provisions of the Indian Limitation Act of 1877, competent to a Court in its discretion to allow interest after the date certain under Act No. XXXII of 1839, provided that the parties have not contracted themselves out of that Act. It is seldom that the provision in the Act enabling a Court to allow interest when a demand in writing has been made could apply in a transaction of mortgage.

It is quite clear that the interest which a Court may allow under Act No. XXXII of 1839 is not contractual interest. The allowance of such interest under Act No. XXXII of 1839 and the rate which may be allowed depend, not upon the agreement of the parties, but entirely on the discretion of the Court. It is allowed as compensation for the breach of contract, in the one case to pay at the time certain, and in the other case for non-compliance with demand in writing, and is damages, although the amount of such

damages is ascertained by allowing interest at a rate fixed by the Court in the particular case. There is on this point no difference in principle between Act No. XXXII of 1839 and s. 28 of the 3rd and 4th William IV, Chapter 42. In England interest allowed as damages under s. 28 of the 3rd and 4th William IV, chapter 72 does not become a debt until judgment, when it becomes part of the judgment-debt.

It is obvious to our minds that article 116 of the second schedule of the Indian Limitation Act, 1877, would apply to any claim to have interest allowed under Act No. XX XII of 1829 in respect of the non-payment on the due date of the money due under a registered mortgage-deed, if the suit was not brought within six years of the breach of contract.

Turning now to Act No. IV of 1882, it seems to us to be clear, upon a comparison of the provisions of ss. 83, 84, 86, 88 and 92 of that Act that the interest on payment of which in addition to the principal money a mortgagor may prevent foreclosure or sale or obtain redemption is the interest which he contracted to pay, and the payment of which was secured by the mortgage-deed. Those who were responsible for the drafting of the Transfer of Property Act, 1882 (Act No. IV of 1882) were not always careful to use the same terms to express the same meaning, yet it is not conceivable that it was intended that a mortgagor should be entitled to redeem under s. 92 upon payment of the principal money and the contractual interest due under the mortgage deed, on the day fixed by the Court, plus the costs of suit, if any, awarded to the mortgagee, and that in order to avoid a sale under ss. 88 and 89 he should be obliged to pay, not only the principal moneys and the contractual interest due under the same mortgage-deed on the day fixed by the Court, plus the costs of suit, if any, awarded to the mortgagee, but in addition such interest as might be allowed by a Court under Act No. XXXII of 1839, and yet, if the decision in *Bikramjit Tewari v. Durga Dayal Tewari* (1) be correct, that is the result of ss. 88, 89 and 92 of Act No IV of 1882. For example, it is agreed between the parties in this case, through their counsel and

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vakils respectively, that the amount due for principal and interest up to the expiration of the year of the mortgage is Rs. 7,840, and that, if the decision first referred to of the Calcutta High Court is correct, the decree for principal and interest to the date of suit must be for Rs. 17,906. This suit was instituted on the 23rd of April, 1892. On the 22nd of April, 1892, the mortgagor might have deposited in Court under s. 83 of Act No. IV of 1882 the "amount remaining due on the mortgage," which was, if our construction of the mortgage be correct, Rs. 7,840; and then s. 84 would have applied: or the mortgagor might, on the 22nd of April 1892, have instituted a suit for redemption, and under s. 92 of Act No. IV of 1882 he would have been entitled to a decree for redemption conditional on his paying to the defendants or into Court the sum of Rs. 7 840 and the costs of suit, if any, awarded to the defendants. There is no question under s. 92 of interest which may be allowed under Act No. XXXII of 1839. The term "the mortgage money" of s. 92 is thus defined by s. 58(a)—"the principal money and interest of which payment is secured for the time being are called the mortgage money." We do not suppose that anyone would suggest that interest which might be allowed by a Court under Act No. XXXII of 1839 could be brought within that definition, unless the parties had specially agreed in their deed that any interest which might be allowed by a Court under Act No. XXXII of 1839 should be deemed to be interest secured by the deed. We have never seen a deed containing such an agreement. Even without the light afforded by a consideration of ss. 83, 84, 90, 92 and 94 of Act No. IV of 1882, we should have had no doubt that the term "interest on the mortgage" of s. 86 must be interest due on the mortgage and not interest allowed by a Court under Act No. XXXII of 1839: the latter interest is neither due nor does it become due on the mortgage; it becomes due under the decree of the Court and under that decree alone, and consequently is not part of the amount on default of payment of which the mortgaged property as such may be sold under s. 89. When in a suit for sale under ss. 88 and 89 a Court allows under Act No. XXXII of 1839 interest *post diem*, its decree, so far as such *post diem* interest is

concerned is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. It is only under the Transfer of Property Act, 1882 (Act No. IV of 1882), that a Court can in a suit on a mortgage make a decree for sale of the mortgaged property as such, and a Court has not jurisdiction to extend those sections by decreeing a sale of mortgaged property if the interest which it allows under Act XXXII of 1839 be not paid.

The mortgage-deed in this case was made on the 28th of April, 1879. The only decree for sale of the mortgaged property which could be made in this suit was a decree under s. 88 of Act No. IV of 1882. It would work a grievous hardship on a second mortgagee who had advanced his money in 1883 on the same security, having taken the precaution to inform himself by a search in the office of the Registrar of Deeds as to the nature of the previous incumbrance, and who trusted to the provisions of Act No. IV of 1882, if his rights were postponed and the first mortgagee should under a decree under Act No. XXXII of 1839 be entitled to be paid out of the proceeds of a sale of the mortgaged property the interest allowed to him by the Court under Act No. XXXII of 1839 before any portion of the proceeds of such sale should be applied towards discharging the second mortgage. Such was not, in our opinion, the intention of the Legislature when passing Act No. IV of 1882 and enacting s. 295 of Act No. XIV of 1882.

The appellant has limited the relief which we can afford to him in this appeal by his prayer in his memorandum of appeal, which is:—"that the award of *post diem* interest to the amount mentioned in the valuation of this appeal be set aside and the suit to that extent be dismissed." The amount mentioned in the valuation of the appeal is Rs. 9,750. Deducting that sum of Rs. 9,750 from the amount decreed by the Court below, we give the plaintiffs a decree for the balance, and order that upon the defendant-appellant paying to the plaintiffs or into Court such balance on or before the 27th of November next, the plaintiffs should deliver up to the defendant-appellant or to such person as he may appoint all documents in the possession or power of the plaintiffs relating to

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the mortgaged property, and shall transfer the property to the defendant-appellant free from all incumbrances created by the plaintiffs, or any of them, or any person claiming under them, or any of them; but that, if such payment is not made on or before the 27th of November next, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale, after defraying thereout the expenses of the sale, be paid into Court and applied in payment of the said amount found due by us to the plaintiffs, and that the balance, if any, be paid to the defendant-appellant or other persons entitled to receive the same. We vary the decree below, and allow this appeal to the extent above mentioned with costs to the appellant in this Court, and otherwise dismiss the suit.

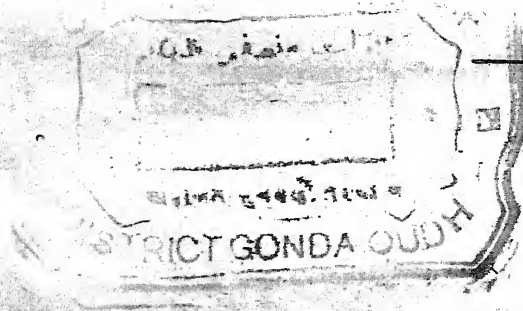
Decree modified.

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ACTS—1830—XXXII.—Act No. IV of 1882, ss. 88, 89—Mortgage—Non-contractual post diem interest—Such interest not part of the mortgage money—Act No. XV of 1877, sch. ii, art. 116—Limitation] When in a suit for sale under ss. 88 and 89 of Act No. IV of 1882 a Court allows, under Act No. XXXII of 1830, interest post diem, its decree so far as such post diem interest is concerned is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. *Bikramji Tewari v. Durga Dyal Tewari* dissented from.

Article 116 of sch. ii of Act No. XV of 1877 applies to a claim to have interest allowed under Act No. XXXII of 1830 in respect of the non-payment on the due date of the money due under a registered mortgage-deed, if the suit is not brought within six years of the breach of contract.

—1857—XI (OFFENCES AGAINST THE STATE), See Act No. I of 1872, s. 32.

—1800—XLV (INDIAN PENAL CODE), ss. 41, 116. See Letters Patent, s. 8.

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ss. 75, 457, 511. Attempt to commit house-breaking by night after previous convictions. Sentence.] Section 75 of Act No. XLV of 1800, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions of offences falling within Chapter XII or Chapter XVII, such offence being punishable under s. 511. See *Saran Tato v. The Empress*, *Empress of India v. Ram Dayal*, *Empress v. Nana Bahin* and *Queen-Empress v. Sriharan Bauri* referred to.

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ss. 75, 511—Attempt to commit an offence after previous conviction—Sentence.] Section 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress v. Ajudhia* approved.

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ss. 159, 160—Affray—"Public place."] Held that a *chabutra* which was neither a place to which the public had a right of access, nor a place to which the public were ever

permitted to have access, was not, though it adjoined a public road, a "public place" within the meaning of s. 159 of the Indian Penal Code.	Page.
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ACTS—1860 XLV.--(INDIAN PENAL CODE) s. 193-- <i>Fabricating false evidence—Report made by Amin executing Civil Court's decree that he had been obstructed—Similar report to Police—Subsequent deposition in Court—Alternative charges.</i>] Held that a report made by an Amin of a Civil Court deputed to give possession of certain property in execution of a decree as to his having been obstructed in so doing to the Court executing the decree, and a similar report made to the Police, would not, even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code, and consequently, where such Amin was charged in the alternative with making the two reports as above and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement.	
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... s. 396.— <i>Dacoity in the course of which murder is committed—Facts necessary to establish the offence provided for in s. 396.</i>] When in the commission of a dacoity murder is committed it matters not whether the particular dacoity charged under s. 396 of Act No. XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. <i>Queen-Empress v. Umrao Singh</i> distinguished.	
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... s. 409— <i>Criminal breach of trust—Conviction for criminal breach of trust on general deficiency in account.</i>] An accused person may be charged with criminal breach of trust in respect of a general deficiency, and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. <i>Reg. v. Lloyd Jones</i> ; <i>Reg. v. Chapman</i> ; <i>Reg. v. Wolstenholme</i> and <i>The Queen v. Lambert</i> referred to.	
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... s. 411— <i>Evidence—Pointing out stolen property concealed in a place not under the accused's control.</i>] Where the sole evidence against a person charged with an offence under s. 411 of the Indian Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person; held that this was not in itself sufficient evidence to support a conviction under the abovementioned section.	
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—1870—VII (COURT-FEES ACT) SCH. II, ART. 11, (b)— <i>Act No. VI of 1882 ss. 159, 214—Appeal Court-fee.</i>] An order under s. 214 of Act No. VI of 1882 (Indian Companies Act) is not a decree or an order having the force of a decree, and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act No. VII of 1870 (Court-fees Act), sch. ii, art. 11(b), with a Court-fee stamp of Rs. 2.	
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ACTS—1870—X. (LAND ACQUISITION ACT), s. 30—*Apportionment of compensation referred to Judge—Denial by one party interested of right of another to share in compensation—Appeal*] Under s. 35 of Act No. X of 1870 the fact that one of the persons concerned denies altogether the right of another of such persons to share in the compensation awarded will not prevent an appeal lying from the order of a District Judge apportioning compensation. *Kishan Lal v. Shankar Singh* overruled.

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—1871—XXIII (PENSIONS ACT), ss. 3, 4. See *Hindu Law* (4).

—1872—1 (INDIAN EVIDENCE ACT), s. 30—*Joint trial—Statements of co-accused who pleaded guilty—Evidence*] Where two out of several persons on their trial in a Court of Session on a joint charge pleaded guilty and made certain statements to the Court, it was held that such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as after pleading guilty the persons making those statements were no longer on their trial.

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—, s. 32—*Evidence proving title by inheritance to raj estates—Proof of pedigree—Estate held as separate under the Hindu Law—Widow's interest therein—Act No. XI of 1857 (Offences against the State)—Confiscation.*] A raj estate was claimed by the appellant as the nearest agnatic kinsman of the last raja in possession, who had died without male issue, but leaving a widow, and a daughter by her, both of whom died before this suit.

The respondent, who had obtained possession under a gift from the widow, denied the claimant's relationship to the raja. He also alleged that no title could have descended to the claimant from father to son, as the father's property had been confiscated on his conviction of an offence against the State, and sentence under Act XI of 1857.

Held, that as the widow had taken the estate as the result of her husband's having owned it as his separate property, the respondent, whose only title was through her, had not established that a right of survivorship had accrued to the plaintiff's father on the death of the raja in 1853; therefore, there was no right of that kind which could have been confiscated by the sentence which was passed in 1862. Nor had the father any right of inheritance that could be enforced during the life of the widow, who outlived him. The separation of the estate, as held by the late raja, negatived both the confiscation and limitation.

The claimant, to prove his title, relied upon a pedigree, not stated in any document produced, that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two manzars of the raj estate. The raja, called upon to answer a proceeding at settlement, had not given a direct denial to the alleged relationship.

On the contention that there were steps in the pedigree as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements within s. 32 of the Indian Evidence Act, I of 1872, and as to which the evidence was insufficient.

Held, that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the

deceased raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the raj estates on the widow's death; this opinion being founded on the documentary evidence.

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IX (INDIAN CONTRACT ACT), ss. 2, 25, cl. (2), 70, *Execution of decree—Contract—Consideration*] H. D. and S. D., two brothers, constituted a joint Hindu family owing considerable landed property. H. D. having incurred heavy personal debts, the two brothers in 1879 united in applying to have their property taken over by the Court of Wards. This was done; and on the 17th of June 1889, while such property was still under the management of the Court of Wards, the two brothers entered into an agreement whereby H. D. remained as manager of the property with an allowance of Rs 12,000 per annum for his support, but ceded to his brother absolutely and unconditionally all his proprietary interest in the family property, and all power to make the family property liable in any way for the payment of his debts. On the 6th of October 1889, the Court of Wards released the property freed from the liabilities imposed upon it by H. D. In 1891 one B. D. obtained in the Court of the Subordinate Judge at Agra a money-decree against H. D. H. D. died in the following year, and, subsequently to his death, B. D. sought to execute his decree against S. D. as representative of H. D. by attachment of property in the hands of S. D. S. D. objected to the attachment and his objection was allowed. B. D. appealed, and on this appeal it was held that, having regard to the agreement of the 17th June 1889, above referred to, the property in question could not be attached as the property of H. D. The said agreement was not bad for want of consideration; the consideration being that at the request of his brother, which must be presumed from the circumstances of the case, S. D. had agreed to place his interest in the property under the management of the Court of Wards, and had also foregone, during the ten years that estate was under the management of the Court of Wards, the greater part of his interest in the profits of the estate, and had refrained on cessation of the Court of Wards' management from suing his brother for an account; and even if this were not so, the agreement would be good either under s. 25 cl. (2) or under s. 70 of Act No. IX of 1872.

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1873—XIX (N.-W. P. LAND REVENUE ACT), s. 62. *See Pre-emption* (4).

..., s. 257—*See Pre-emption*. (5)

1877—I (SPECIFIC RELIEF ACT), s. 42. *See Civil Procedure Code* s. 13.

1877—III (INDIAN REGISTRATION ACT), ss. 59, 60. *See Burden of proof*.

1877—XV (INDIAN LIMITATION ACT) s. 12—*See Civil Procedure Code* ss. 623, 625, 541.

..., ss. 15, 19,—*See Civil Procedure Code*, ss. 268, 485, 486.

..., SCH. II, ARTS. 57, 120. *Limitation—Loan on security of movable property—Suit to recover money by sale of property pledged and also from the defendant personally.* Where a plaintiff who had lent money on the security of movable property sued to recover the money both by sale of the property pledged

and also asked for a decree personally against the defendant, should the amount realised by the sale prove insufficient, it was held that, so far as the plaintiff prayed for a decree against the defendant personally, art. 57 of the second schedule of Act No. XV of 1877 was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. *Nim Chand Baboo v. Jagabundhu Ghose* followed.

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ACTS—1877—XV (INDIAN LIMITATION ACT), SCH. II, ART. 116. See Act No XXXII of 1839.

..., SCH. II, ART. 118. *Suit for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption* [Article 118 of sch. II of the Indian Limitation Act applies only to suits for a declaration that an adoption is invalid or in fact never took place; it does not apply to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that a given adoption is invalid. *Basdeo v. Gopal*; *Ghandharap Singh v. Lachman Singh*; *Pudajirao v. Ramrao* and *Lala Parbhu Lal v. Myles* referred to.

Natthu Singh v. Gulab Singh ... 167

..., SCH. II, ARTS. 178, 179. See Execution of decree.

..., SCH. II, ART. 179. *Limitation.*—*Date of final decree or order of the appellate Court—Execution of decree.* [Certain plaintiffs obtained a decree for pre-emption in respect of four villages. The defendant appealed, and the lower appellate Court dismissed the appeal. The defendant again appealed, but in his appeal only questioned the decision of the lower appellate Court in respect of two of the villages in suit. In this second appeal the plaintiff's suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendant's appeal was dismissed as to the other.

Held that in respect of all the three villages as to which the final decree stood in favor of the plaintiff, limitation began to run against the decree-holders from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate Court's decree. *Hur Proshad Roy v. Enayet Hossain*, *Sangram Singh v. Bujharat Singh* and *Mashiat-un-nissa v. Rani* distinguished.

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—1879—I (INDIAN STAMP ACT) s. 3, SUB-S. (4), CL. (1)—*Stamp—Bond—Promissory note.* [Held that a document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest was not "attested by a witness" within the meaning of cl. (1) of sub-s. 4 of s. 3 of Act No. 1 of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document that the document was correct and was written by his pen.

Reference under Act No. 1 of 1879, s. 49 ... 211

..., s. 3, CL. (13), s. 7—*Stamp—Lease or mortgage.* [A zamindar leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and grass, by a document which also contained an agree-

- ment by the lessées hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles. *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte Hill* referred to.
- Reference under Act No. I of 1879 (Indian Stamp Act), s. 49 ... 55
- ACTS—1879—XVIII (LEGAL PRACTITIONERS' ACT), s. 36. *See Letters Patent*, s. 8.
- 1881—V (PROBATE AND ADMINISTRATION ACT), CH. V—*Letters Patent*, s. 10—*Probate*—“*Order*”—“*Decree*”—*Civil Procedure Code*, ss. 2, 591—*Appeal*.] An appeal will lie under s. 10 of the Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Chapter V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the findings of fact arrived at in the judgment under appeal.
- Umrao Chand v. Bindraban Chand ... 475
- 1881—XII (N.-W. P. RENT ACT), s. 9. *Occupancy tenant—Succession—Collateral—Sharer in cultivation*.] Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy-holding during the lifetime of the deceased occupancy-tenant. But *non sequitur* that if there is a more remote collateral who was a sharer in the cultivation of the occupancy-holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. *Badri Das v. Debi Das*, referred to.
- Shankar Lal v. Dalip Singh ... 38
- ..., s. 93. *Suit by recorded co-sharer for recorded share of profits—Adverse possession*.] The mere circumstance that a co-sharer's name is recorded in the Revenue papers will not prevent a suit by him for his share of profits being barred by limitation if in fact he has received no profits for more than twelve years prior to such suit. *Maksood Ali Khan v. Ghazee-ood-deen and Tulshi Singh v. Lachman Singh* followed.
- Muhammad Husain v. Badri Prasad ... 428
- 1882—IV (TRANSFER OF PROPERTY ACT), s. 41. *See Practice*.
- ..., s. 59. *Mortgage by deposit of title deeds—Mortgage by deposit of title deeds before the coming into force of Act No. IV of 1882*.] Up to the 1st of July 1882, being the date of the coming into force of Act No. IV of 1882, there was no difference between the law in the Mufassal and that prevalent in the Presidency towns as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt. *Waghela Rajsanji v. Sheikh Masludin*; *Varden Seth Sam v. Luckpathy Royjee Lallab*; *Bunsee Dhur v. Heera Lall*; *Lalji v. Gobind Ram and Mirza Muhammad Ali v. Nawab Sarat Jang* referred to.

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A mortgage effected as above described will cover future advances as well as the existing debt or contemporaneous advance in respect of which it was made. *Ex parte Langston* referred to.

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), s. 60. *Mortgage—Breaking up security—Mortgagee allowing mortgagor to pay a portion of the mortgage debt and releasing part of the mortgaged property.* A mortgagee by allowing his mortgagor to pay a portion of the mortgage debt and releasing a proportionate part of the mortgaged property does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece-meal. *Marana Ammann v. Pendyala Perabotula and Subramanyam v. Mandayan* not followed.

Lachmi Narain v. Muhammad Yusuf

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s. 63. *Mortgage—Prior and subsequent mortgagees—Right of prior mortgagee to add to the amount secured by his mortgage outlay incurred by him in the preservation of the property mortgaged.* Where a mortgagee of agricultural land had with the consent of his mortgagor spent money in repairing a well on the property which had been rendered useless from natural causes, it was held that such mortgagee was entitled, in a suit by a subsequent mortgagee against him for redemption, to add the amount so expended to the mortgage-debt to be paid by the plaintiff before he could obtain the decree for redemption, claimed by him.

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s. 85. *Mortgage—Suit for sale on mortgage—Non-joinder of parties—Joint Hindu family—Suit for sale on mortgage by father without joining sons.* When a plaintiff mortgagee institutes a suit for sale under s. 85 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. So held by EDGE, C. J., KNOX, BLAIR, BURKITT and AIKMAN, JJ., *Dissentiente BANERJI, J.*

Held, by BANERJI, J., that where, under the circumstances above described, a decree has been obtained against the father alone without joining the sons, the sons cannot in the suit brought by them plead against the operation of the decree on their interests any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve them from liability for their father's debt had they been made parties to the mortgagee's suit.

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s. 85. See Mortgage.

s. 85. See Jurisdiction.

ss. 85, 89. See Act No. XXXII of 1880.

s. 90—*Usufructuary mortgage—*

Suit by usufructuary mortgagees for sale of equity of redemption

of mortgaged property in execution of a decree for mesne profits and costs.] Certain usufructuary mortgagees not having been put in possession of the mortgaged property by the mortgagor sued and obtained a decree for possession with mesne profits and costs. Under this decree the mortgagees were put in possession of the mortgaged property. They then applied for attachment and sale of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property, reserving their rights and interests under the mortgage. *Held*, that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act, 1882. *Azim-ullah v. Najm-un-nissa and Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry* referred to.

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—, s. 106. *Landlord and tenant—Suit in ejectment—Notice to quit—Denial of landlord's title by defendant prior to suit.* In a suit by a landlord for ejectment of a tenant, no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unhamma Devi v. Vajkunta Hegde and Dodhu v. Madhavrao Narayan Gadre* referred to.

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—VI (INDIAN COMPANIES ACT), ss. 130, 132. *Company—Winding up—"Court"—Jurisdiction.* *Held* that with regard to a Company the registered office of which was at Mussooree 'the Court,' as that term is used in Part IV of Act No. VI of 1882 (Indian Companies Act), means the Court of the District Judge of Saharanpur, and not that of the Subordinate and Small Cause Court Judge sitting at Mussooree or Dehra.

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s. 53.

—s. 144. *See* Civil Procedure Code,

—s. 169. *See* Letters Patent, s. 10.

sch. ii, art. 11 (b).

—ss. 169, 214.—*See* Act VII of 1870.

—1887—I, (GENERAL CLAUSES ACT), s. 3, CL. (13). *See* Civil Procedure Code, s. 283.

—IX (PROVINCIAL SMALL CAUSE COURTS ACT), s. 25.—*Civil Procedure Code, s. 622—Revision—Grounds upon which an application for revision under s. 25 of Act No. IX of 1887 will be entertained.* It is no ground for revision under s. 25 of Act No. IX of 1887 that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *Amir Hassan Khan v. Sheo Baksh Singh* referred to.

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—XII (BENGAL & C., CIVIL COURTS ACT), ss. 19, 21. *See* Civil Procedure Code, s. 283.

—1888—V (INVENTIONS AND DESIGNS ACT), ss. 4, 30.—*Invention—Improvement—Combination of known substances to produce a known result—Burden of proof.* *Held*, that a combination, effected by placing

one known material side by side with another known material, not involving the exercise of any special inventive power, and ending in a result which differed from previous results only because the material so placed produced an improved article, did not amount to an "invention" as defined by Act No. V of 1888.

Held further, that it is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed.

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ACTS 1889—VII (SUCCESSION CERTIFICATE ACT) s. 4.—*Joint Hindu family—Suit by survivor for debt due to joint family—Evidence—Presumption as to nature of debt where the family is joint.* Where a debt is advanced from the funds of a joint Hindu family and is due to that family, no certificate under Act No. VII of 1889 is necessary to enable the survivor of such family to recover the said debt.

Such debt as above being a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family. *Jagmohandas Kilabhai v. Alla Maria Duskul* followed.

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—1890—VIII (GUARDIAN AND WARDS ACT)—*Joint Hindu family—Appointment of guardian of property of minor.* It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *Virupakshappa v. Nilganga* and *Sham Kuar v. Mohanunda Sahay* referred to

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—1892—VI, ss. 4, 5. See Execution of decree.

ADOPTION. See Act No. XV of 1877, sch. ii, art. 118.

— See Hindu Law (1).

ADVERSE POSSESSION. See Act No. XII of 1881, s. 93.

AFFRAY. See Act No. XLV of 1860, ss. 159, 160.

APPEAL. See Act No. VII of 1870, sch. ii art. 11(b).

— See Act No. X of 1870, s. 39.

— See Act No. V of 1881, ch. V.

— See Civil Procedure Code, s. 366.

— See Civil Procedure Code, ss. 366, 568.

— See Civil Procedure Code, s. 373.

— See Criminal Procedure Code, s. 195.

— See Criminal Procedure Code, s. 421.

— See Execution of decree.

— See Execution of decree (2).

— See Letters Patent, s. 10.

— See Practice.

— to Her Majesty in Council. See Civil Procedure Code, ss. 600, 601.

— withdrawal of—See Civil Procedure Code, s. 561.

APPLICATION for leave to sue in forma pauperis. See Civil Procedure Code, ss. 403, 409.

ARBITRATION. See Civil Procedure Code, ss. 525, 526.

ATTACHMENT. See Civil Procedure Code, s. 234.

See Civil Procedure Code, ss. 268, 485, 486.

See Civil Procedure Code, ss. 483, 484, 486.

ATTEMPT. See Act No. XLV of 1860, ss. 75, 457, 511.

ss. 75, 511.

BOND. See Act No. 1 of 1879, s. 3, sub-s. (4), cl. (b).

BURDEN OF PROOF—*Mortgage deed—Recitals in instrument—Act No. III of 1877, ss. 59, 60—Evidence.*] In a suit brought by a mortgagee upon a mortgage by conditional sale for payment of the mortgage-debt or in default for foreclosure, one of the defendants, not being one of the original mortgagees, but a purchaser at auction sale under a Rent Court decree, resisted the suit and put the plaintiff to proof on the document under which he claimed. Held that the mere production of the deed of mortgage which had been thus questioned and the fact that that deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III of 1877 were not sufficient to shift the burden of proof on to the defendants.

Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshware Peshakar v. Budhanuddi* referred to.

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See Muhammadan Law.

CAUSE OF AUCTION, See Civil Procedure Code, ss. 43, 44.

CIVIL PROCEDURE CODE, ss. 1, 2, 19, 24. See Jurisdiction.

ss. 2, 591. See Act No. V. of 1881, ch. V.

s. 13—*Res judicata—Finding in judgment not embodied in decree and not essential to the making of the decree as framed—Act No. I of 1877 (Specific Relief Act) s. 42.*] A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit.

The finding of fact to operate as *res judicata* need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*.

A matter cannot be said to be "directly and substantially in issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1882 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed.

The following cases were referred to—*Krishna Behari Roy v. Brojeswari Chowdrance*, *Soorjomonee Dayee v. Suddanand Mohapatra*, *Rajah Riu Bahadoor Singh v. Mussumut Lachon Koer*, *Redha Madhub Holder v. Munohar Mookerji*, *Shaikh Banat-oolah v. Shaikh Ameer Buksh*, *Niamut Khan v. Thada Raddia*, *Jamiat-un-nissa v. Lutf-un-nissa*, *Man Singh v. Narayan Das*, *Lachman Singh v. Mohan*, *Ram Gholam v. Shioatub*, *Anandabhai v. Sakharam Pandurang*, *Devarakonda Narasamma v. Devarakonda Kanaya*, *Ghela Iokharom v. Sankalchand Jetka*, *Tarakant Banerji v. Paddomony Datta*, *Robinson v. Dalip Singh*.

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CIVIL PROCEDURE CODE, s. 43. See Civil Procedure Code, s. 373.

—, s. 43, 44.—*Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.*] Where a plaintiff sued for possession of immovable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. Held that the claim for mesne profits for the period above mentioned was barred by s. 43 of the Code of Civil Procedure. *Lalji Mal v. Hulasi* and *Ferkola v. Subbana* referred to.

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—, s. 44. See Pre-emption (1).

—, s. 53. See Pre-emption (2).

—, s. 53. *Plaint—Form of plaint in suit by Company in liquidation—Act No. VI of 1882, s. 144.*] Held that a plaint in a suit by a bank in liquidation in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in Liquidation," and which was also subscribed and verified in the same terms, was not a valid plaint, having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom* referred to.

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—, s. 174.—*Non-attendance of witness in obedience to a summons—Lawful excuse.*] There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who, having been summoned, has failed to attend, when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued at the neces-

sary expenses of such witness as specified in s. 160 of the Code of Civil Procedure.	Page.
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CIVIL PROCEDURE CODE, s. 234.— <i>Execution of decree—Attachment during lifetime of judgment-debtor—Application after death of judgment-debtor to bring his representatives on the record of the execution proceedings—Procedure.</i> In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act No. XIV of 1882: but if the property has been attached during the lifetime of the judgment-debtor, it then comes into the lands of the law and attachment does not abate on the death of the judgment-debtor, and for the purpose of proceeding against, and if necessary selling, that property it is not necessary to implead anyone as a legal representative.	
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_____, s. 234, <i>See</i> Execution of decree (3).	
_____, ss. 234, 244, 278, 283. <i>See</i> Execution of decree (4).	
_____, s. 244. <i>See</i> Execution of decree (2).	
_____, ss. 253, 582, 583. <i>Execution of decree—Security for performance of decree of appellate Court—Method of enforcing such security.</i> Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner provided for by s. 253 of the Code of Civil Procedure. <i>Bans Bahadur Singh v. Mughla Begam</i> followed. <i>Thirumalai v. Ramayyar</i> and <i>Chakrapa Naik v. Baslingappa</i> approved. <i>Kali Charun Singh v. Balgobind Singh</i> and <i>Tokhan Singh v. Udwant Singh</i> dissented from.	
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_____, s. 258. <i>Execution of decree—Limitation—Uncertified payment of part of decretal amount—Decree-holder entitled to give evidence of such uncertified payment in answer to a plea of limitation against execution of the decree.</i> Section 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. <i>Fakir Chand Bose v. Madan Mohan Ghose</i> , <i>Purmananddas Jiwandas v. Vallabdas Wallji</i> , <i>Sham Lal v. Kanabia Lal</i> , <i>Zahur Khan v. Bakhtawar</i> and <i>Hurri Pershad Chowdhry v. Nasib Singh</i> referred to.	
Kishan Singh v. Aman Singh	42
_____, ss. 268, 485, 486.— <i>Attachment of debt by third party—Attachment not prohibitory of suit by creditor against debtor—Limitation—Act No. XV of 1877, ss. 15, 19—Acknowledgment of debt—Powers of Sarbarakar.</i> An attachment before judgment under s. 485, Civil Procedure, issued by a Court at the instance of a third party, prohibited the creditor from recovering, and the debtor from paying, the debt:— <i>Held</i> , that an order in those terms was not an order staying the institution of a suit within the meaning of s. 15 of the Limitation Act No. XV of 1877.	

Shib Singh v. Sita Ram referred to and approved,—the same rule relating to all attachments whether before or after judgment, couched in similar terms. The person restrained from receiving payment may, nevertheless, assert his right in a suit for the money due.

A debtor, since deceased, had executed a bond to his creditor. The heir of the debtor having been disqualified, and a sarbarakar of the estate having been appointed, the latter had executed a *mukarrarnamah* or power-of-attorney empowering an agent to act in reference to the land, and the charges thereon. The agent admitted the debt:—

Held that, on the construction of the power given to him, authority to the agent to acknowledge a personal liability of the debtor and his heir, within the meaning of s. 19 of Act No. XV of 1877, could not be implied.

It was doubted whether the sarbarakar, not having been appointed guardian of the heir, could have made such an acknowledgment herself.

Another acknowledgment, a notice from the Collector, as agent for the Court of Wards, admitting the estate's indebtedness to the original holder of the bond, was relied upon. In addition to the bond-debt now in suit, another sum, due on a mortgage, was claimed by the same creditor, and the terms of the notice, would apply to either:—

Held that, the debt referred to in the notice not having been identified with the bond-debt in suit, acknowledgment of the latter by the Collector was not established within s. 19.

The oral evidence of the Collector as to his intention was not admissible to construe the notice, but accompanying circumstances might be shown and considered.

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CIVIL PROCEDURE CODE, s. 283. *Jurisdiction—Valuation of suit—Act No. XII of 1887 (Bengal, &c., Civil Courts Act) ss. 19, 21—Act No. I of 1887 (General Clauses Act) s. 3, cl. (13).*

When in a suit under s. 283 of Act No. XIV of 1882 the claimant-objector makes the judgment-debtor or his representative a party as defendant to the suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of property in execution of the decree.

Gulzari Lal v. Jadawn Rai, Durga Prasad v. Rachla Kuar, Krishnama Chariar v. Srinivasa Ayyangar, and Modhusudan Koer v. Rathi. l Chander Roy distinguished; *Matahir Singh v. Behari Lal and Madho Das v. Ranji Patak* referred to.

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ss. 335, 334; 2, 244.—*Execution of decree—Application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Representative of party to suit—Auction-purchaser who was also assignee of decree.* In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favor the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an

order in his favor. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside.

Held, that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and, being unappealable, an application for revision thereof might lie.

The auction-purchaser, though he happened also to be the assignee of the decree, was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor, within the meaning of s. 335.

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CIVIL PROCEDURE CODE, ss. 350, 359. *Insolvency—Powers exercisable by Court under s. 359—Withdrawal of application by applicants without permission to renew—Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.* A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by a creditor, pass an order of imprisonment under that section; and if on the motion of a creditor it has ordered the imprisonment of the applicant it cannot subsequently act under the last clause of s. 359. *Kadir Bakhsh v. Bhawani Prasad* referred to.

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditor's costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.

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—, s. 351 (d)—*Insolvency—“Other act of bad faith”* Act of bad faith committed by applicant for declaration of insolvency antecedently to his application.] The expression “any other act of bad faith” as used in s. 351, cl. (d) of the Code of Civil Procedure means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution, and whether or not the bad faith is connected with the liability which has resulted in that decree. *Bavachi Packi v. Pierce, Leslie & Co.*, approved. *Salamat Ali v. Minahan*, distinguished.

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—, s. 366. *Order rejecting application for suit to abate—Appeal.* Held that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contem-

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plated by s. 366 of the Code of Civil Procedure and that no appeal would lie therefrom.

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CIVIL PROCEDURE CODE, ss. 366, 588. *Abatement of suit—Appeal.*]
No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure, such order neither amounting to a decree nor being specifically appealable under s. 588. *Bhikaji Ram Chandra v. Purshotam*, dissented from.

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..., s. 373 — “Order” — “Decree” — *Appeal.*]
An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 588. *Kalian Singh v. Lekhnai Singh*, *Jagdish Chaudhri v. Talati Chaudhri*, *Zakuri v. Dina Nath*, and *Jogadindro Nath v. Sarat Sundari Devi* referred to. *Ganga Ram v. Data Ram* not followed.

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..., ss. 373, 43. *Withdrawal of suit with permission to bring a fresh suit on the same cause of action—Effect of such withdrawal.*] Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought.

A plaintiff, therefore, who has obtained an order under s. 373 of the Code, will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw. *Venkata Shetti v. Ranga Nayak* followed.

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..., ss. 373, 649. *See Execution of decree (6):*
..., ss. 408, 409—*Application for leave to sue in forma pauperis—Application refused—Institution of regular suit—Limitation.*] When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full court fee, such suit dates, for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is disappointed.

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..., s. 482—*Minor—Circumstances necessary to make a compromise by a guardian or next friend on behalf of a minor binding on the minor.*] In order to make an agreement or compromise, to which s. 482 of the Code of Civil Procedure applies, a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and, before making the agreement or entering into the compromise, should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.

From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree have been taken by the Court.

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- Kalavati v. Chedi Lal ... 531
- CIVIL PROCEDURE CODE, ss. 483, 484, 486. *Execution of decrees—Attachment of money deposited in Court.*] The term "property" as used in ss. 483 and 484 of the Code of Civil Procedure is wide enough to include property of every description, movable and immovable, whether in the actual possession of the defendant or of some other person on his behalf; and the words "the Court may require him . . . to produce and place at the disposal of the Court" only refer to such property as is capable of being produced in Court.
- Where property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court and it is not necessary that a separate formal notice should be drawn up.
- Chedi Lal v. Kuarji Dichit ... 82
- ss. 525, 526. *Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.*] An objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa; Samal Nathu v. Jaishankar Dalsukram; Venkatesh Khando v. Chanappavda; Lalla Isharee Parshad v. Harbajan Tewaree; Hussaini Bibi v. Mohsin Khan; Surjan Raot v. Bhikari Raot; and Muhammad Nawaz Khan v. Alam Khan*, referred to.
- Amrit Ram v. Dasrat Ram ... 21
- s. 561—*Appeal—Objections—Withdrawal of appeal—Failure of objections.*] If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is withdrawn, the objections cannot be heard. *Bahadoor Singh v. Bhugwan Dass; Ram Pershad Ojha v. Bharosa Kunwar; Skama Churn Ghose v. Radha Kristo Chaklanuvis; Coomar Puresh Narain Roy v. Messrs. R. Watson & Co.; Subhai Dayalji v. Raghunathji Vasauji; Dhondi Jagannath v. The Collector of Salt Revenue and the Secretary of State for India and Maktab Beg v. Hasan Ali*; referred to.
- Jafar Husain v. Ranjit Singh ... 528
- ss. 562, 565. *See Civil Procedure Code, ss. 600, 601.*
- ss. 562, 564, 566, 622—*Remand—Refusal of Court of first instance to record evidence tendered—Refusal of Appellate Court to record additional evidence.*] The plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower

appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs-respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was held that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to re-try the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record.

Durga Dihal Das v. Anoraji 29

CIVIL PROCEDURE CODE, ss. 566, 574. *Issue not disposed of by the lower appellate Court—Procedure* [In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed a decree in favor of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, viz., execution or non-execution, in the following words:—"I do not think the claim made out by the plaintiff on his own evidence."

Held, that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Code of Civil Procedure and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court.

Kanhai Lal v. Manorath Ram, Madho Singh v. Kashi Singh and Durga Dihal Das v. Anoraji referred to.

Ganga Prasad v. Lal Bahadur Singh 117

ss. 600, 601. *Refusal of certificate of leave to appeal to Her Majesty in Council—Finality of an order with reference to the admission of an appeal to Her Majesty in Council—Remand—Civil Procedure Code, ss. 562, 565.* [An order comprising the decision of the Appellate High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one that can never while this decision stands, be disputed again, is a final decree for the purposes of appeal to the Queen in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit.

Rahimbhoy Habibbhoy v. Turner referred to and followed.

The certificate, of which the grant was part of the procedure in the admission of such an appeal, was refused by the High Court on the ground that the proposed appeal was from an order remanding a suit under s. 562, Civil Procedure; and that orders of remand under that section were, by the practice of the Court, treated as not final within s. 595, cl. (a). That practice is probably correct; but here the order only purported to be under s. 562, which was not applicable. The first court had not disposed of the suit upon a preliminary point, so as to have excluded evidence of fact appearing to the appellate court essential; and s. 565 appeared to be applicable rather than s. 562. The appellate court had reversed, once for all, the decision of the first court upon an issue as to the making and validity of a will, which issue governed the whole case.

Saiyid Muzhar Hossein v. Mussamat Bodha Bibi 112

CIVIL PROCEDURE CODE, s. 622. See Act No. IX of 1887, s. 25.	Page.
..... s. 623, 625, 541— <i>Review of judgment—Application for review not to be accompanied by copy of judgment, decree or order sought to be reviewed—Act No. XV of 1877, s. 12.</i> It is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed.	
Wajid Ali Shah v. Nawal Kishore	213
COMPANY. See Act No. VI of 1882, ss. 130, 132.	
COMPROMISE. See Civil Procedure Code, s. 462.	
CONFISCATION. See Act No. I of 1872, s. 32.	
CONSIDERATION. See Act No. IX of 1872, ss. 2, 25, cl. (2), 70.	
CONSTRUCTION. See Interest post diem.	
CONTRACT. See Act No. IX of 1872, ss. 2, 25, cl. (2), 70.	
COURT-FEE. See Act No. VII of 1870, sch. ii, art. 11(b).	
CRIMINAL BREACH OF TRUST. See Act No. XLV of 1860, s. 409.	
CRIMINAL PROCEDURE CODE ss. 106, 423. <i>Security to keep the peace—Appellate Court not competent to require such security—Sentence, powers of appellate Court in respect of</i> The Magistrate of a district acting as an appellate court in criminal cases cannot make an order under s. 106 of the Code of criminal Procedure. <i>Aslu v. The Queen-Empress and Queen-Empress v. Lachman</i> referred to.	
Where a District Magistrate acting as an appellate Court in a criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of Rs. 10 or in default a further term of six weeks' rigorous imprisonment; held that as the latter sentence might involve an enhancement of the former such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure.	
Queen-Empress v. Ishri	67
....., s. 144. See Magistrate of the District, powers of—	
....., ss. 161, 162. <i>Use at trial in Sessions Court of statements made to police officer investigating case—Evidence.</i> Though, speaking generally, statements, other than dying declarations, made to a police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the police officer he would be allowed to refresh his memory by referring to it, but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the police officer.	
Queen-Empress v. Taj Khan	57
....., s. 195. <i>Sanction to prosecute—Sanction in respect of an offence committed in the course of a civil suit of over</i>	

Rs. 5,000 in value—Appeal.] Where sanction to prosecute is granted in respect of perjury committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie.

Ganga Dei v. Sher Singh ... 51

CIVIL PROCEDURE CODE, s. 421—*Summary rejection of appeal—Court to record reasons for rejection.* It is advisable that a Court when rejecting an appeal in a criminal case under the provisions of s. 421 of the Code of Criminal Procedure, 1882, should record shortly its reasons for such rejection in view of the possibility of such order being challenged by an application for revision.

Queen-Empress v. Nannhu ... 241

... s. 531. *Sessions Court—Jurisdiction—Appeal presented within, but heard outside, the local limits of the jurisdiction of a Sessions Court.*] A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. *Held* that the trial of such appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, was covered by s. 531 of the Code of Criminal Procedure and did not render the trial of the appeal a nullity.

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CUSTOMARY RIGHT. *See* Easement.

DACOKITY. *See* Act No. XLV of 1860, (Indian Penal Code), s. 396.

DECREE. *See* Civil Procedure Code, s. 373.

DOWER. *See* Muhammadan law (1) and (2).

EASEMENT. *Customary right—Facts necessary to establish the existence of a customary right.*] The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kothi*, and for demolition of a *chabutra* thereon. The defendants denied the plaintiff's title and alleged that they always used the *chabutra* as a sitting place, and that during the *Moharram* the *tazias* and *olams* were exhibited upon the *chabutra* and a *takht* was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the *Moharram*. The lower appellate Court on the question of the defendants' right to use the said land in the manner claimed by them found as follows:—"That various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* upon the land and sung there." *Held* that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired.

Where a local custom excluding or limiting the general rules of law is set up, a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

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EVIDENCE. See Act No. XLV of 1860, s. 411.	
----- See Act No. 1 of 1872, s. 30.	
----- See Act No. 1 of 1872, s. 32.	
----- See Act No. VII of 1889, s. 4.	
----- See Burden of proof.	
----- See Criminal Procedure Code, ss. 161, 162.	
-----, refusal of Court to record— See Civil Procedure Code, ss. 562, 564, 566, 622.	

EXECUTION OF DECREE. (1) *Attachment of immovable property—Order striking off application for execution but maintaining attachment—Appeal*] A decree-holder in execution of his decree attached certain immovable property of his judgment-debtor; but on his taking no other steps to complete the execution of the decree the Court struck off the execution-proceedings maintaining the attachment. Against this order the decree-holder appealed. *Held* that, inasmuch as the order in question was not a judicial disposal of the application for sale and would not preclude the decree-holder from continuing the execution of his decree, an appeal from such order was superfluous and must be dismissed.

Rattanji v. Hari Har Dat Dube

EXECUTION OF DECREE (2)— <i>Civil Procedure Code, s. 244—Objection by representative of party to the suit to the jurisdiction of the Court which passed the decree.</i>] Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree after it has been executed, as it would to a dispute between such parties relating to the execution of a decree before it had been executed.	243
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It is competent to the Court charged with the execution of a decree to consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. *Muhammad Sulaiman Khan v. Fatima and Haji Musa, Haji Ahmed v. Purmanand Nursey* referred to.

Imdad Ali v. Jagan Lal

(3)— <i>Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.</i>] In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor, it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. <i>Srihary Mundul v. Murari Chowdhry.</i>	478
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Seth Shapurji Nana Bhai v. Shankar Dat Dube

(4). <i>Civil Procedure Code, ss. 234 244 278, 283—Representative of deceased judgment-debtor—Practice—Appeal.</i>] Certain decree-holders obtained during the lifetime of their judgment-debtor attachment of certain immovable property as belonging to the said judgment-debtor; but, on the decree-holders' seeking to bring the property to sale, one S. D. came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S. D. and the	431
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widow of the judgment-debtor (who died about the time the previous objection was filed) placed on the record as representatives of the judgment-debtor. S. D. filed a similar objection to this application also; but both objections being heard together on the 6th September 1892 were dismissed, and S. D. was placed on the record as representative of the deceased judgment debtor. On appeal by S. D. against "the order of the District Judge of Jaunpur of the 6th September 1892," it was held that the order making S. D. a party to the execution-proceedings as representative of the judgment-debtor rendered any order as to his former objection superfluous and that order was appealable under s. 244 of the Code of Civil Procedure.

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EXECUTION OF DECREE (5). *Decree as originally framed incapable of execution—Amendment of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), sec. ii, arts. 178, 179.* Where a decree as originally framed was found by the High Court to be incapable of execution and was not finally amended by that Court, so as to become capable of execution, until nearly twelve years after it was passed, it was held that an application to execute such decree which was made within three years from the date of the amendment of the decree was within time, the rule of limitation applicable being that prescribed by art. 178 of sec. ii of Act No. XV of 1877.

Muhammad Suleman Khan v. Muhammad Yar Khan ... 39

(6). *Effect as regards limitation of striking off petition for execution of decree—Second application, without express leave granted when the first was struck off, ss. 373, 649, of the Code of Civil Procedure, inapplicable here—Act No. VI of 1892, ss. 4 and 5.* It is clear, both from the Code of Civil Procedure itself, and from the provisions of the Limitation Act of 1877, that a succession of applications for execution is contemplated. Section 647, of the Code of Civil Procedure, cannot, on its true construction, be applied to execution of decree, and was inapplicable to petitions for execution before, and independently of, the passing of Act VI of 1892, sections 4 and 5.

A first application for execution of a decree having been, on the decree-holder's petition, struck off the list of cases pending for hearing, a second application was made within the period of limitation.

Held,—That the first application, notwithstanding that the order striking it off had been made, was not annulled, but afforded a fresh starting point for limitation.

Held, also, that although the petition for execution had been withdrawn without leave to apply again having been expressly granted by the court, the petitioner's right to renew his petition, within due time, remained. The provisions of section 373, which could only have applied through the effect of section 647, had not been rendered applicable thereby to petitions for execution.

The judgment in *Sarju Prasad v. Sita Ram* overruled. That in *Bunko Behary Gangopadhyaya v. Nil Madhub Chutopadhyaya* approved.

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(7). *Limitation—Execution stayed by reason of injunction for more than three years—Revival of previous application.* A decree-holder in execution of his decree attached a decree held by his judgment-debtor. On the 3rd of July 1888 the decree-holder applied for execution of his decree by enforcement of the second decree,

and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July 1888 until the suit was decided. The application for execution was meanwhile struck off, but the attachment was maintained. On the 19th of March 1892 the suit was dismissed and the injunction came to an end. On the 29th of October 1892 a fresh application was made for execution.

Held that this second application was not barred by limitation, but was to be regarded as an application to renew the proceedings commenced by the former application, which had been suspended by the act of the Court and not by anything for which the decree-holder was responsible. *Peary Mohun Chowdhry v. Romesh Chunder Nundy, Kalyanbhai Dipchand v. Ghanashamlal Jadhunathji and Paras Ram v. Gardner* referred to.

Lakhmi Chand v. Ballam Das

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- EXECUTION OF DECREE. See Act No. IX of 1872, ss. 2, 25, cl. (2), 70.
 sch. ii, art. 179. See Act No. XV of 1877, (Indian Limitation Act),
 See Civil Procedure Code, s. 234.
 See Civil Procedure Code, ss. 253, 582, 583.
 See Civil Procedure Code, s. 258.
 See Civil Procedure Code, ss. 335, 334; 2, 244.
 See Civil Procedure Code, s. 462.
 See Civil Procedure Code, ss. 483, 484, 486.

EXPECTANCY. See Hindu law (2).

FALSE EVIDENCE. See Act No. XLV of 1860, s. 193.

GUARDIAN AND MINOR. See Act No. VIII of 1890.

HINDU LAW (1)—*Benares School—Adoption—Adoption by one of the regenerate classes of a mother's sister's son.*

Held by EDGE, C. J., KNOX, BLAIR and BURKITT, JJ. (BANERJI and AIKMAN, JJ., dissenting).

The Hindu law of the School of Benares does not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the onus of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal.

The authority in the School of Benares of the Dattaka Mimansa of Nanda Pandita considered. That Mimansa is not on questions of adoption an "infallible guide" in the School of Benares, and is not followed when it imposes on the right of adoption restrictions not to be found in the recognised authorities of the School of Benares.

Held by BANERJI, J. (AIKMAN, J., concurring):—The adoption by a Hindu belonging to one of the three regenerate classes of his mother's sister's son is prohibited according to the Hindu law of the Benares School. Such prohibition is not merely directory, but the adoption is absolutely interdicted and void and cannot be validated by the rule of *factum valet*.

Held also by BAXTER, J.:—That the Dattaka Chandrika and the Dattaka Mimansa are works of paramount authority on questions relating to adoption, as well in those parts of India which are governed by the law of the Benares School as elsewhere.

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HINDU LAW (2). *Hindu widow—Power of widow of sonless Hindu to mortgage ancestral property—Pardah-nashin woman, conditions necessary to the execution of a valid deed by—Expectancy—Mortgage purporting to be of property in which one of the professed executants had an interest in expectancy only.* One Raja Khairati Lal died in 1866 possessed of considerable property both movable and immovable. He left surviving him a widow, Rani Hulas Kuar, who died in 1878, a daughter, Rani Achhan Kuar, married to one Raja Lalji, and two grandsons, sons of Achhan Kuar, Kuar Inayat Singh and Kuar Shamsheer Bahadur the latter of whom died some time subsequent to 1881, as did also his father Raja Lalji.

In December 1877, a mortgage-deed was executed over certain of the ancestral property of the family of Khairati Lal, the ostensible executants being Raja Lalji for himself, and Hulas Kuar, Achhan Kuar and Inayat Singh through Lalji as their general attorney. This deed was to secure a debt of Rs. 10,000 stated to be to some small extent for an advance in cash, and as to the balance in respect of certain previous debts and interest thereon. At the date of this bond both Inayat Singh and Shamsheer Bahadur were minors.

In April 1881, Hulas Kuar having in the meanwhile died, and Inayat Singh having attained majority, but Shamsheer Bahadur being still a minor, a second bond of a similar nature to the former was executed by Lalji, Achhan Kuar and Inayat Singh for Rs. 20,000, this sum being recited as composed of various debts of earlier date with interest thereon, of an advance to pay Government revenue, an advance for expenses of the marriage of Lalji's daughter and a very small balance in cash.

It was not shown that the debts secured by either of these two bonds were debts incurred for legal necessity by the widow or daughter of Khairati Lal, or that the mortgagees after due inquiry had reasonable grounds for believing that such necessity existed, nor was it shown that the mortgages were entered into with the consent of all the husband's kindred under circumstances which might raise a valid presumption that the debts secured by them were properly incurred.

It was further not shown that the power-of-attorney under which Lalji purported to act in executing the bond of 1877 on behalf of Hulas Kuar, Achhan Kuar and Inayat Singh was ever properly explained to the professed executants or that they understood its import; nor was it shown that either of the bonds was duly explained to and comprehended by the professed executants other than Lalji himself, in manner required by law in the case of documents executed by *pardah-nashin* women; nor, though at the date of the execution of the second bond Inayat Singh had attained the age of majority, did it appear that he signed the bond with any clear knowledge of its contents, or of the liability which he was professing to incur thereby, or otherwise than through the influence brought to bear on him by his father, Lalji.

Held, on suit by the mortgagees to bring to sale the ancestral property which had been of Khairati Lal in his life time in enforcement of the two mortgages above-mentioned, that the mortgages were not bind-

ing on the alleged executants or on the ancestral property at the date of suit in the hands of Achhan Kuar. Page.

Kuar Inayat Singh's interest in the family property in suit could only be affected by the mortgage of the 2nd of April 1881, on proof that the debt was in fact one, or was, on reasonable inquiry by and statements made to the lenders of the money believed by them to be one, in respect of which his mother Rani Achhan Kuar, as a Hindu daughter in possession, could mortgage or charge the family property beyond her own then vested interest in it, or on proof that he, as one of the reversioners, by joining with his mother in executing the documents of mortgage, led the lenders of the money to believe that such a necessity existed for the loan as enabled the Hindu daughter to create a valid mortgage on the family property beyond the extent of her own life interest.

The Hindu law which prevails in these Provinces recognizes no power in a reversioner to sell or mortgage his interest in expectancy, even although he may be the heir apparent.

It is absolutely necessary, before holding that a *pardah-nashin* lady or her property is liable on a contract alleged to have been made by her, or in consequence of an alleged execution by her of a general power-of-attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her property. It is also necessary when money-lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner, who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner or the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience.

Achhan Kuar v. Thakur Das

HINDU LAW (3 — *Hindu widow—Suit to set aside alienation by Hindu widow—Reversioners—Grandsons of daughter of alienor's deceased husband.* Held, in a suit to set aside an alienation made by a Hindu widow of property which had been of her deceased husband in his lifetime that the sons of the son of a daughter of the alienor's late husband were, their father and grandmother being dead, reversioners, and, as such, entitled to sue to set aside the alienation made by the widow. *Krishnayya v. Pichamma and Babu Lal v. Nanku Ram* referred to.

Sheobarat Kuari v. Bhagwati Prasad

(4). *Voluntary transfer alleged to have been made by a Hindu widow—Burden of proving her knowledge of her rights—Construction of the Pensions Act (Act No. XXIII of 1871), sections 3 and 4—Certificate to precede suit for *malikāna* payable by Government.] Where a voluntary transfer by a Hindu widow is alleged, the burden of proving that it was a free gift, made with knowledge by her of her rights, is on the donee.*

The plaintiff, widow of the only son who survived his father, who was the owner of village lands and other property, had become, on her husband's death without issue, entitled, as his widow, to the estate which he had inherited. But she obtained possession of only half of it. The other half was in the recorded possession, when this suit was brought, of the widow of her late husband's younger brother, who died in his father's lifetime.

The case which the latter widow, as defendant, now sought to make, was that she had become entitled to a share in the estate as the result of a series of transactions, by way of family arrangement, in which the two widows, and their mother-in-law, widow of the deceased father, had taken part. These included a reference to arbitration, a release, and dakhil kharij in settlement records. *Held*, that the plaintiff must succeed, in the absence of proof, of which the burden was on the defendant, that the plaintiff, when ceding half of the estate to which she was entitled, had knowledge of her right, as widow, to the whole, and had freely made what in effect was a gift.

A village, part of the estate, had been made over to the Government by the parties, who in consideration received a *mālikāna* in perpetuity, or, in other words, a grant of a portion of the revenue in lieu of their proprietary right. *Held*, that the right to the *mālikāna* was on the construction of ss 3 and 4 of the Pensions Act, XXIII of 1871, in the absence of a certificate obtained under that Act, excluded from judicial cognizance in this suit. *Vasudeo Sala Shis Modak v. The Collector of Ratnagiri and Maharawal Mohan Singji Trysingji v. The Government of Bombay* referred to and approved.

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HINDU LAW, Widow's interest in separate estate. *See* Act No. I of 1872, s. 32.

HINDU WIDOW. *See* Hindu Law. (2), (3) and (4).

INSOLVENCY. *See* Civil Procedure Code ss. 350, 359.

..... *See* Civil Procedure Code, s. 351(d).

INTEREST *post diem*—*Construction of bond.*] On the construction of a written contract to repay in two years from its date money with interest at 15 per cent. to be paid half-yearly, arrears of interest being added half-yearly to the principal, the Judicial Committee concurred with the High Court that there was no contract to pay interest at that rate after the date fixed for repayment.

Held, that on that construction the creditor would be entitled, on default made in the repayment, to receive interest, but, technically, as damages assessed; and the rate *prima facie* would be the same as that provided by the contract during the two years, although there is no rule of law making that rate necessarily the measure of the damages. The compounding the interest after the expiration of the two years was disallowed, and an account was directed on the basis that the interest '*post diem*' should be simple, at 15 per cent., down to the date of the plaint, and after that date at 6 per cent. till payment.

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INTEREST POST DIEM. *See* Act No. XXXII of 1839.

INVENTION. *See* Act No. V of 1888, ss. 4, 30.

JOINT HINDU FAMILY. *See* Act No. IV of 1882, s. 85.

..... *See* Act No. VII of 1889, s. 4.

JOINT HINDU FAMILY. See Act No. VIII of 1890.
 JOINT TRIAL. See Act No. I of 1872, s. 30.

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JURISDICTION—*Regulation No. IV of 1876—Act No. IV of 1882, s. 88—Civil Procedure Code, ss. 1, 2, 19, 24—Mortgage of property situated partly in the district of Moradabad and partly in the Tarai—Suit for sale in Moradabad Court.* Held that the Courts of the Moradabad district had no jurisdiction to pass a decree, in a suit for sale on a mortgage, for sale of land situated in the Tarai, to which at the time of the mortgage and of the suit thereon Regulation No. IV of 1876 applied, by reason merely of a portion of the property mortgaged being situate in the Moradabad district.

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See Act No. VI of 1882, ss. 130, 132. ... 483

See Civil Procedure Code, s. 283.

See Criminal Procedure Code, s. 531.

LANDLORD AND TENANT. See Act No. IV of 1882, s. 106.

LETTERS PATENT, S. 8—"Reasonable cause"—*Offer to give a gratification, contrary to s. 36 of Act No. XVIII of 1879—Abetment—Act No. XLV of 1860, ss. 41, 116.* A vakil of the High Court signed and sent a letter to another vakil of that Court, who practised in District Courts subordinate thereto. The purport of this, which was one of several printed forms prepared for circulation to vakils practising in districts, was to the effect that the vakil, to whom it was addressed, "could easily send his clients' cases, both civil and criminal," to the writer, who would conduct them in that Court. And—"as a remuneration"—the fees paid by the clients would be shared between the writer and the vakil who had sent the cases.

The Judicial Committee concurred substantially in the conclusions of the High Court that this was an incitement within s. 116 (abetment) of the Indian Penal Code to commit an offence made penal by s. 36 (which was a special law within s. 41 of that Code) of Act No. XVIII of 1879, the Legal Practitioners' Act. This misconduct had been aggravated by the appellant's having denied to the Vakils Association, North-Western Provinces, and caused evidence to be called to negative his having signed the printed letter, which he had signed. Thus, there was "reasonable cause" within s. 8 of the Letters Patent of March 17th, 1866, establishing the High Court, for his suspension, to which, for four years from the date of that Court's order, his punishment was reduced.

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s. 10—*Act No. VI of 1882 s. 169—Extension of time for serving notice of appeal—No appeal from order of High Court refusing extension—Discretionary order.* No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act No. VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters Patent. *Banno Bibi v. Mehdi Husain, Muhammad Naim-ullah Khan v. Ihsan-ullah Khan, Kishen Pershad Panday v. Tiluckdhari Lall, Lutf Ali Khan v. Asgur Baza, Hurrish Chunder Chowdry v. Kali Sundari Debia, Mohabir Prosad Singh v. Adhikari Kunwar, Lane v. Esdaile, Kay v. Briggs, The Amstil and Ex parte Stevenson* referred to.

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- LETTERS PATENT. s. 10. See Act No. V of 1881, ch. V.
- LIMITATION. See Act No. XXXII of 1839.
- See Act No. XV of 1877, sch. ii, arts. 57, 120.
- See Act No. XV of 1877, sch. ii, Art 118.
- See Act No. XV of 1877, (Indian Limitation Act), sch. ii, art. 170.
- See Civil Procedure Code, s. 258.
- See Civil Procedure Code. ss. 268, 485, 486.
- See Civil Procedure Code, ss. 403, 409.
- See Execution of decree (5), (6) and (7).
- See Pre-emption (2).

MAGISTRATE OF THE DISTRICT--Powers of--*Criminal Procedure Code, s. 144--Executive powers of Magistrate--Order which might have the effect of interfering with the execution of a decree of a Civil Court.* [A District Magistrate has no power, either under s. 144 of the Code of Civil Procedure or in his executive capacity, to make an order for the re-building of a structure on private land which has fallen into disrepair or been pulled down; neither has he power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court.]

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MISJOINDER of causes of action. See Pre-emption (1).

MORTGAGE--Sale by mortgagor of part of the mortgaged property--*Such sale not to affect the rights of the mortgagee under his mortgage,--Act No. IV of 1882, s. 88* [The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person *Lala Dilawar Sahai v Dewan Bolakiram, Indukuri Rama Raju v Yerramilli Subbarayudu and Banwari Das v. Muhammad Mushiat* referred to.]

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----- *Suit by second mortgagee against purchaser of equity of redemption who had paid off a prior mortgage--Second mortgagee ignoring lien of purchaser of equity of redemption* [One A S purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgaged property to sale making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. Held that such omission was not a valid reason for dismissing the plaintiff's suit altogether. *Salig Ram v. Harcharan Lal* distinguished.]

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MORTGAGE. See Act No. XXXII of 1830.	
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MUHAMMADAN LAW (1). <i>Dower—Mortgage by widow in possession in lieu of dower of immovable property which had been of her husband.</i> A Muhammadan widow in possession of immovable property of her late husband in lieu of her dower has no power to mortgage such property. <i>Chuhi Bibi v. Shams-un-nissa Bibi</i> ...	19
(2). <i>Dower—Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.</i> When a Muhammadan widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. <i>Muhammad Karim-ullah Khan v. Amani Begam</i> ...	93
(3). <i>Widow—Lien of widow for dower—Such lien not acquired by widow taking possession against the consent of the other heirs.</i> If a Muhammadan widow entitled to dower has not obtained possession of property of her deceased husband lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. <i>Mussumat Bebee Bachun v. Sheikh Hamid Hossein, Musummut Wahid-un-nissa v. Musummut Shabrattun, Syud Bazayet Hossein v. Dooli Chund, Mussumat Meerun v. Mussumat Najeibun, Ali Muhammad Khan v. Aziz-ul-lah Khan and Bibi Mehrun v. Musammal Kubeerun</i> referred to. <i>Woomatool Fatima Begum v. Meerunmun-nissa Khanum, Ahmad Hossein v. Musammal Khodaja and Balund Khan v. Mussumat Janee</i> distinguished. <i>Amanat-un-nissa v. Bashir-un-nissa</i> ...	76
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PLAINT. See Civil Procedure Code, s. 53.

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POST DIEM INTEREST. See Interest *post diem*.

PRACTICE. *Appeal*.—*Decision based upon ground not specifically urged by appellant*.—Act No. IV of 1882, s. 41.] Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.

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PRE-EMPTION (1) *Civil Procedure Code, s. 41—Misjoinder of causes of action—Zamindari and appurtenant sir land sold by separate deeds—Suit to pre-empt both zamindari and sir.*] Where a zamindari share and the sir-land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the sir-land was not liable to be defeated on the ground of misjoinder of causes of action.

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— (2) *Civil Procedure Code, s. 53—Amendment of plaint—Area of property claimed in suit for pre-emption described as less than the true area.*] A Court is not precluded from returning a plaint for amendment because at the time it is returned for amendment the period of limitation for the suit may have expired.

The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality. Held that the Court had power and ought to have allowed the plaint to be amended and that the amendment was not precluded by the fact that at the time when the application for amendment was made the limitation for the suit had expired. Held also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold.

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— (3)—*Limitation—Sale with subsequent agreement for re-purchase—Mortgage by conditional sale.*] On the 6th of June 1887, one B. K. sold a certain zamindari share to S. On the 18th of May 1888, B. brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888, the vendor, the vendee and the pre-emptor entered into an agreement, by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June 1891 the vendor, affecting to treat the transaction of the 6th of June 1887 as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act, accompanied by payment of the price of the property into Court, and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November 1891 B. K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession and asking that the agreement of the 6th of July 1888 might be considered null and void. On the 1st of September 1892 one B. S. filed a suit for pre-emption of the said property.

Held, that the original transaction of the 6th of June 1887 was an out-and-out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by R. S. was barred by limitation.

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PRE-EMPTION (4)—*Wajib-ul-arz*—Construction of document—Co-sharer—Holder of resumed *mudfi*—Act No. XIX of 1873, s. 62—Rules of the Board of Revenue, 1870, Department I, Rules 30 and 51.] The plaintiff, a co-sharer in the village of Deobarampur, sued for pre-emption of certain land, being 'resumed revenue-free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*kissadar*) is bent upon selling or mortgaging his right (*haggiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it: after that any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it, then a stranger may take it."

Held that, under the circumstances of the case, the plaintiff had no right of pre-emption in respect of the land claimed by him, the vendor not being, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the resumed *mudfi*.

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(5)—*Wajib ul-arz*—Partition of village, originally one, into three separate *mahals*.—New record of village customs framed on partition.—Rules of the Board of Revenue of the 13th November 1875—Act No XIX of 1873, s. 257.] Where at the settlement of a village constituting a single *mahál* a record-of-rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate *maháls*, and, in accordance with the rules of the Board of Revenue of the 13th November 1875, issued under s. 257 of Act No. XIX of 1873, a new record of village customs was framed which did not give to the sharers in any one of new *maháls* any right of pre-emption in respect of land situated in another *mahál*, it was *held* that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favor of the co-sharers in any one *mahál* in respect of land situated in another *mahál*

Per AIKMAN, J.—Where a village originally one, is divided by perfect partition into two or more *maháls*, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying outside any given *mahál*, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one *mahál* the co-sharers had pre-emptive rights against each other. *Mots Sah v. Musammát Goklee* and *Jai Ram v. Mahabir Rai* referred to.

Under the above circumstances the mere retention of a community of interest in certain property such, e.g., as roads, &c., will not give the sharers in one *mahál* any right of pre-emption over land situated in another. *Nazir-ud-din v. Kadir Bakhsh*, referred to; *Gokal Singh v. Mannu Lal*, dissented from.

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PRE-EMPTION (6)—*Wajib-ul-arz*—"Stranger."] Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first to 'own brothers' secondly, to 'near cousins,' thirdly, to 'shareholders.' *Held*, the parties being Muhammadans, that in regard to a sale of land to which this *wajib-ul-arz* applied a nephew (brother's son) of the vendee was a 'stranger' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Bhurey Mal v. Nawal Singh* distinguished.

Amjad Ali v. Mushtaq Ahmad 454

PRESUMPTION. See Act No. VII of 1889, s. 4.

PROBATE. See Act No. V of 1881, ch. V.

PROCEDURE. See Civil Procedure Code, s. 234.

————. See Civil Procedure Code, ss. 536, 574.

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PROMISSORY NOTE.—See Act No. I of 1879 s. 3, sub-s. (4), cl. (b).

"PUBLIC PLACE"—See Act No. XLV of 1860, ss. 159, 160.

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REMAND. See Civil Procedure Code, ss. 562, 564, 566, 622.

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2, 244.

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————. See Act No. I of 1879, s. 3, cl. (13), s. 7.

SUCCESSION. See Act No. XII of 1881, s. 9.

VALUATION OF SUIT. See Civil Procedure Code, s. 283.

WAJIB-UL-ARZ. See Pre-emption (4), (5) and (6).

WIDOW, lien of for dower. See Muhammadan law.

WITHDRAWAL OF SUIT. See Civil Procedure Code, s. 373.

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